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88-173

No. .....

Supreme Court, U.S.
FILED
JUL 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

LOIS LINQUIST, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

OTIS R. BOWEN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES, AND UNITED STATES RAILROAD RETIREMENT BOARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, as the court of appeals held, attorney's fees may not be awarded under the "common benefit" exception because that theory does not apply when the federal government is the defendant, despite the fact that the exception was incorporated into subsection (b) of the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(b), and that Congress authorized fees awarded under the common benefit exception to be paid by the United States pursuant to 28 U.S.C. § 2412(c)(2).

2. Whether, in light of this Court's analysis in *Pierce v. Underwood,* No. 86-1512 (June 27, 1988), the court of appeals erred in denying fees under subsection (d) of the EAJA, 28 U.S.C. § 2412(d), by relying primarily on a contrary decision from another court to determine that the government was substantially justified.

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OPINIONS BELOW

The opinion of the court of appeals denying petitioner's application for fees for her attorneys' work in the appellate court (App. 1a-16a) is reported at 839 F.2d 1331 (8th Cir. 1988). The opinions of the district court and court of appeals ruling in petitioner's favor on the merits (*id.* at 17a-57a, 59a-71a) are reported at 633 F.Supp. 846 (W.D.Mo. 1986), aff'd, 813 F.2d 884 (8th Cir. 1987). The original order of the court of appeals awarding fees (*id.* at 72a-73a), its order granting respondents' petition for rehearing (*id.* at 74a), and its order denying petitioner's petition for rehearing and suggestion of rehearing en banc (*id.* at 75a) are unreported.

JURISDICTION

The opinion of the court of appeals denying petitioner's request for an award of fees was entered on February 17, 1988 (App. 1a-16a), and her petition for rehearing and suggestion of rehearing en banc were denied on March 24, 1988 (*id.* at 75a). On June 7, 1988, Justice Blackmun entered an order extending petitioner's time to file this petition up to and including August 1, 1988. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the EAJA, 28 U.S.C. §§ 2412(b), (c)(2), and (d)(1)(A), are set out verbatim as Appendix H (App. 76a-77a).

STATEMENT

The case on the merits was a successful challenge to two federal agencies' interpretation of the "excess earnings" test as applied to retirees receiving benefits under both programs. As a consequence of that challenge, over 5300 retirees have received reimbursement of more than $8.3 million for the agencies' misapplication of the statutory scheme from 1972 to 1987, and the respondent agencies have been permanently enjoined from utilizing the incorrect procedure.

1. The Social Security Administration (SSA) and the Railroad Retirement Board (Board) interpreted provisions of their respective authorizing Acts to require each to offset 50% of a retiree's benefits for all earnings above the annual earnings limit. For the majority of retirees, who are eligible under only one program, the result was a partial reduction of their benefits, thus effecting the dual intention of saving the program money while simultaneously not discouraging them from working after retirement.

Some retirees were eligible both for Social Security benefits on their own work records and for Railroad Retirement benefits as the surviving spouses of individuals

who had worked in the railroad industry. Because both agencies reduced benefits by fifty cents for each dollar earned over the earnings limit, these individuals were subjected to a 100% offset.

2. Acting on behalf of a nationwide class, petitioner Lois Linquist challenged this double-offset as violating the intent of Congress. The district court determined that it had jurisdiction over defendant Bowen under 42 U.S.C. § 405(g) and 28 U.S.C. § 1361 (App. 20a-29a). Its jurisdiction over the Board was pursuant to the latter provision and to 28 U.S.C. § 1337 (*id.* at 29a-32a & n.5). The class was certified as requested (*id.* at 34a-44a).

On the merits, the district judge relied extensively on the dissenting opinion of Judge MacKinnon in a case raising the same issue, *Burns v. U.S. Railroad Retirement Board*, 701 F.2d 193 (D.C.Cir. 1983) (see App. 44a n.8), to conclude that Congress' dominant goal of encouraging people to work by employing only a partial offset required rejection of the agencies' interpretation of the statutory scheme (*id.* at 44a-55a). He therefore enjoined the double-offset policy and ordered SSA and the Board to repay the additional 50% that had been withheld from the thousands of class members (*id.* at 55a-57a).

A motions panel of the Eighth Circuit stayed the district court's order without explanation (App. 58a), but the court of appeals ultimately affirmed in all respects. It determined that the district court had properly exercised jurisdiction over SSA pursuant to either 42 U.S.C. § 405 (g) or 28 U.S.C. § 1361 (*id.* at 61a-64a & n.12), and that the latter provision also authorized jurisdiction over the Board (*id.* at 65a-66a). Its view of the merits closely

paralleled that of the district court, as it emphasized that "the clearly articulated purpose [of the partial offset] was to encourage retired persons to work" (*id.* at 67a). It thus concluded that the policy of the two agencies could not stand, as "[t]he statutory scheme makes sense only if this overriding congressional intent is preserved" (*id.* at 71a) (citations omitted).

3. Ms. Linquist then filed her request for fees with the court of appeals for her attorney's work in that court.[1] She contended that she was entitled under both subsections (b) and (d) of the EAJA, on the grounds that her efforts had created a common benefit for the class and that the government's position was not substantially justified.

In its original ruling of September 1, 1987, the court found in her favor under subsection (b): "[T]he Court finds that the claimant has recovered under a common law theory of common benefits which has conferred a substantial benefit on the members of an ascertainable class" (App. 72a-73a). It did not reach the question of substantial justification raised by subsection (d) (*id.* at 73a).

The court later granted the government's petition for rehearing (App. 74a), and issued a new decision (*id.* at 1a-16a). In that decision, it vacated its prior holding and rejected both of petitioner's contentions.

First, it held that the government was substantially justified (App. 3a-4a). The court cited the government's jurisdictional challenges (*id.* at 4a), but based its decision primarily on the merits. In this regard, it relied on two

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[1]She later filed a fee request in the district court for the work in that court. That motion is pending.

"objective" factors as demonstrating substantial justification. One was the stay of the district court's order by a motions panel of the Eighth Circuit; the other was the majority opinion in *Burns v. U.S. Railroad Retirement Board, supra* (*id.* at 4a).

The court then discussed petitioner's common benefit argument under 28 U.S.C. § 2412(b) (App. 5a-16a). It noted that she satisfied the premise of the common benefit theory: "[T]he suit has served public policy and . . . there is much merit in Linquist's argument that there is public good in the requirement that the agency comply with the statutory mandate of Congress" (*id.* at 8a). But it then pointed to the fictional underpinning of the common benefit theory, by which the defendant is considered a proxy for the plaintiff class for purposes of paying fees, as establishing a barrier to application of the theory in a case against the government: "Our analysis under the common benefit theory . . . is that such a theory cannot prevail against the United States. . . ." (*Id.* at 13a.)[2]

As a consequence, the court observed, the incorporation of the common benefit theory was meaningless: "Our analysis made here is to express our general concern that the amendment to the [EAJA] under section 2412(b) serves little purpose" (App. 14a). Candidly noting that its interpretation "may be a perversion of the intent of Congress" (*id.* at 14a), it concluded:

> "The fact remains that the common law theories of common fund and common benefit simply are not ap-

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[2]The court added that the theory might be applicable in a rare taxpayer suit, but noted that such cases are of doubtful validity because of standing problems (App. 13a).

> plicable against the United States in this instance, and, therefore, it would seem that the language used by Congress in section 2412(b) has very little utility to the litigant who seeks to challenge erroneous governmental application of congressional laws."

Id. at 16a.

Ms. Linquist then requested a rehearing and suggested that the case be reheard en banc, but that request was denied (App. 75a). This petition followed.

REASONS FOR GRANTING THE PETITION

I. AS THE EIGHTH CIRCUIT RECOGNIZED, ITS INTERPRETATION OF SUBSECTION (b) CONTRADICTS THE INTENT OF CONGRESS AND DEPRIVES IT OF ANY MEANING

1. Subsection (b) of the EAJA was intended to render the government liable for fees "to the same extent that any other party would be liable under the common law . . . ." 28 U.S.C. § 2412(b). Thus, the bad faith, common fund, and common benefit exceptions to the "American rule" against fee-shifting were incorporated by reference, as the legislative history expressly set out. H.Rep. No. 96-1418, 96th Cong., 2d Sess. 9 (1980), reprinted in [1980] U.S. Code Cong. & Admin. News 4984, 4987. (See App. 5a-6a.) Congress took this action because it found

> "no justification for exempting the United States in these situations; the change simply reflects the belief that, at a minimum, the United States should be held to the same standards in litigating as private parties.

> As such, it is consistent with the history of § 2412 which reflects a strong movement by Congress toward placing the Federal government and civil litigants on a completely equal footing."

H.Rep. No. 96-1418, *supra,* at 9, reprinted in [1980] U.S. Code Cong. & Admin. News 4984, 4987.

The goal for subsection (b) was thus to provide the same context for litigation against the government as already existed in litigation against private institutions in comparable situations. Despite this clearly expressed intent, the court of appeals has eviscerated the provision by determining that the common benefit exception is not applicable against the United States.

The Eighth Circuit reached this result because it demanded that the common benefit theory be applied exactly as it had been developed in the common law. This conclusion, however, ignores the fact that Congress effectively amended the common benefit theory in this context of the federal government as the defendant. It also ignores the obvious message of the legislation: Congress *must* have intended the common benefit exception to apply in this situation, for there would have otherwise been no purpose to subsection (b).

2. Under the common benefit theory, a court may award fees to a prevailing plaintiff when the plaintiff's actions have conferred benefits on an ascertainable class and when the defendant may be substituted as a proxy for those who have benefited. *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 393-397 (1970). This exception to the "American rule" is the logical and consistent outgrowth of the century-old common fund theory, by which fees are paid from the fund generated by the plaintiff's actions.

See, e.g., *Sprague v. Ticonic National Bank,* 307 U.S. 161, 166-167 (1939). The common benefit theory continues the tradition of recognizing the benefit conferred but, in the absence of an actual fund, spreads the costs of litigation by substituting the defendant as a conduit for those who have benefited. Inherent in the common benefit theory, therefore, is a distinct legal fiction, for its evolution from the common fund theory implicates the pretense that the benefited class, not the defendant, is paying the fee.

Thus, the defendant is perceived as standing in the stead of, or as equivalent to, the benefited class. Accordingly, the theory has been traditionally applied to shareholder suits and to cases involving union democracy, with the defendant company acting as proxy for the class of shareholders and the defendant union as proxy for the class of union members, both of which benefit from the actions of the individual plaintiff. See, e.g., *Mills,* 396 U.S. at 393-397; *Hall v. Cole,* 412 U.S. 1, 8-9 (1973).

3. It was against this background that Congress incorporated the common law exceptions for cases involving the federal government. It undertook this effort not only through subsection (b) itself, but also by expressly authorizing the United States Treasury to pay any fees awarded under the common benefit or common fund theories. 28 U.S.C. § 2412(c)(2).

In a literal sense, this action was inherently contradictory. On the one hand, Congress incorporated by reference a theory constructed around the legal fiction that the benefited class was paying the fees; on the other, it authorized fees awarded under the common benefit exception to be paid by the defendant United States. As a

consequence of the legal fiction, a strict interpretation of the exception will inevitably render it inapplicable when the government is the defendant. The United states will never be a proxy for (i.e., structurally equivalent to) a benefited class of recipients; it is too large an entity. Even if there existed a class which were equivalent to the United States, it would be far too large to satisfy the common law requirement that it be discrete and ascertainable. See, e.g., *Granville House, Inc. v. Dept. of Health, Education, and Welfare,* 813 F.2d 881, 883 (8th Cir. 1987).

The Eighth Circuit's "solution" to this logical conundrum was to accept the strict interpretation of the common benefit exception and thus conclude that it could not be applicable to the government.[3] But the issue is not so simple. Since Congress was determined that the federal government would be subject to the same fee-shifting rules as private institutions, the only conceivable inference is that Congress did not intend a literal application of the common benefit theory in this context. This is buttressed by the fact that Congress authorized payment by the Treasury, an explicit recognition of the fact that the defendant United States was obligated to pay fees and an

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[3]The Tenth Circuit has also held that the common benefit exception is not applicable because the award would come from the government, not from the benefited class. *Jordan v. Heckler,* 744 F.2d 1397, 1400 (10th Cir. 1984); see also *Grace v. Burger,* 763 F.2d 457, 459-460 (D.C.Cir.), cert. denied, 474 U.S. 1026 (1985). By contrast, the Ninth Circuit has implicitly upheld the concept of applying the common benefit theory against the government, but found it inappropriate in the case before it. *Edwards v. Heckler,* 789 F.2d 659, 666 (9th Cir. 1985).

implicit recognition that there would *be* fee awards under the common benefit theory.[4]

The common benefit exception could only be incorporated into the EAJA and applied against the federal government by employing a flexible interpretation. That Congress intended flexibility—that, in effect, it amended the common benefit theory in this context—is apparent from the purpose of subsection (b) and from the authorization of payment by the United States.

The provision must be interpreted not in the vacuum in which the Eighth Circuit was operating, but with recognition of the backgrounds of both the common benefit theory and the EAJA. Since sovereign immunity had previously precluded application of the common law theories to the federal government, see, *e.g., Pealo v. Farmers Home Administration*, 562 F.2d 744, 748 (D.C.Cir. 1977), they had been developed without consideration of the effect of the government's participation in a case. Thus, these theories must here be analyzed with recognition that they are being transplanted into an entirely new context. It would have been illogical for Congress to incorporate the common benefit theory without provision for the special nature of the United States, and Congress did not make that mistake. It brought the common benefit exception into the equation, but it altered one aspect by expressly authorizing the defendant to pay the fee.

Subsections (b) and (c), therefore, require courts to apply the common benefit exception as developed in the

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[4]Given the existence of subsection (c)(2), it is particularly puzzling that the Eighth Circuit premised its holding on a belief that "congressional authorization" for a fee award is "absent" (App. 12a).

common law, but with the caveat that the fee will be paid not by the benefited class or its proxy but by the defendant United States. To apply a strict version of the common benefit theory in this situation is to ignore this element of subsection (b), and to eviscerate it; it also renders subsection (c)(2) without purpose, as there will never be a situation where fees are awarded.

The lower court's decision thus repudiates the intent of Congress, as the court itself acknowledges. It also renders part of the statutory scheme meaningless in violation of the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti v. Franklin,* 439 U.S. 379, 392 (1979). It is presumed that Congress does not pass meaningless provisions, see, e.g., *Sutton v. United States,* 819 F.2d 1289, 1295 (5th Cir. 1987), but that is precisely the effect of the lower court's interpretation.

In order to give meaning to subsections (b) and (c)(2), this Court should grant the petition.

II. WITHOUT BENEFIT OF THIS COURT'S DECISION IN PIERCE V. UNDERWOOD, THE EIGHTH CIRCUIT RELIED ON INAPPROPRIATE FACTORS TO DETERMINE THAT THE GOVERNMENT WAS SUBSTANTIALLY JUSTIFIED

The court of appeals' decision to deny fees under subsection (d) is premised largely upon factors which this Court has since rejected as providing a litmus test to determine substantial justification. The lower court has thus applied an incorrect standard for evaluating substantial justification, and, accordingly, as in other pending

cases, this Court should grant the petition, vacate, and remand for that court to review its decision in light of intervening precedent.

The Eighth Circuit's decision relies on two "objective" factors: the granting of a stay pending appeal and a contrary decision by another appellate court on the same issue. First, the court observes that "three judges of this court felt the issue on the merits was sufficiently close to enter an order staying the effects of the district court's order of relief" (App. 4a). There is no basis for this conclusion, however, for the motions panel gave no reason for staying the district court's order. See *id.* at 58a. The standard for issuing a stay pending appeal requires the balancing of four factors, only one of which involves the merits. See, e.g., *Reserve Mining Co. v. United States,* 498 F.2d 1073, 1076-1077 (8th Cir. 1974). Indeed, here, the government rested its stay motion largely on the potential for waste of public funds and scarce agency resources:

> "The equities weigh heavily in favor of the government and the public not being required to expend what may be unnecessary resources and funds during the further few months needed for an appeal . . . . There is simply no compelling reason to cause the administrative upheaval and expenditure of public funds in these circumstances."

Appellants' Reply in Support of Motion for Stay Pending Appeal (July 3, 1986), at 1-3, filed in *Linquist v. Bowen,* No. 86-1486 (8th Cir.).

When the government informs an appellate court that, in the absence of a stay, it will be required to expend large amounts of time, effort, and funds which will not be

recoverable in the event of its ultimate vindication, the unstated but common practice appears to be that the stay is granted. It is entirely reasonable to assume, therefore, that the motions panel determined that the safest course was to grant a short delay, an approach which was supported by its order for expedited briefing and argument (App. 58a). In any event, there is no basis whatsoever for assuming that the motions panel was influenced to any relevant degree by a belief that the government had a strong position on the merits.

Secondly, the court below was considerably affected by the majority decision in *Burns;* it expressly "note[d] that a distinguished panel of judges sat on the appeal in the District of Columbia . . . ." (App. 4a.) But that approach ignores the fact that five other judges, including Judge MacKinnon dissenting in *Burns,* wrote three comprehensive analyses emphatically supporting the diametrically opposite conclusion. The Eighth Circuit itself held that the challenged policy was irrational, as it observed that the "scheme makes sense only if this overriding congressional intent is preserved" (*id.* at 71a).[5]

Given the inherent problems with relying on these "objective" factors as definitive indicators of substantial justification, it is not surprising that this Court rejected that approach in *Pierce v. Underwood,* No. 86-1512 (June 27, 1988). It did not "disagree that objective indicia can be relevant," slip op. at 14, but it expressly rejected an-

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[5]The court did state that it had found "the issue on the merits to be a close one" (App. at 4a), but that statement was in the context of its reliance on the *Burns* majority opinion.

other court's view as an automatic indication of substantial justification:

> "Obviously, the fact that one other court agreed or disagreed with the Government does not establish whether its position was substantially justified. Conceivably, the Government could take a position that is not substantially justified, yet win . . . ."

Id. at 15. Thus, this Court has repudiated reliance on a single contrary authority as the basis for determining substantial justification; the decision below directly contradicts that holding.

This Court also rejected, for purposes of "objectively establish[ing] substantial justification" (*id.* at 15), the granting of stays by both the lower court and itself, and the granting of a petition for certiorari. While it did not rule out such events as potentially relevant, it did find that they were not persuasive evidence on their own. *Id.* at 16. Here, other than the majority decision in *Burns,* the court of appeals had nothing else on which to base its decision except the stay. And, as has been noted, the court's conclusion that the unexplained stay order offered some insight into the strength of the government's argument is without foundation.

Thus, in evaluating whether the government was substantially justified, the lower court relied on improper factors and applied the wrong standard. In light of *Underwood,* this Court has recently vacated three decisions in which appellate courts had similarly employed an incor-

rect standard for evaluating substantial justification.[6] The same action should be taken in this case, so that the Eighth Circuit must determine whether the government was substantially justified without relying on "objective indicia" which have been repudiated as indicators.

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[6]*Dubose v. Pierce*, No. 85-516 (June 30, 1988) (56 U.S.L.W. 3893); *Battles Farm Co. v. Pierce*, No. 86-1661 (June 30, 1988) (56 U.S.L.W. 3893); *Bowen v. Russell*, No. 87-251 (June 30, 1988) (56 U.S.L.W. 3893).

CONCLUSION

The Court should grant the petition to review the Eighth Circuit's conclusion that fees may not be awarded because the common benefit exception is not applicable when the United States is the defendant. Alternatively, the Court should grant the petition, vacate the decision below, and remand for further consideration in light of *Pierce v. Underwood, supra.*

July, 1988

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 86-1486/1790/2075

Lois Linquist and Alberta E. Burns,	)	
Appellees,	)	
v.	)	Appeals from the United States District Court for the Western District of Missouri.
Otis R. Bowen, Secretary of the Department of Health and Human Services, and United States Railroad Retirement Board,	)	
Appellants.	)	

Submitted: December 16, 1987

Filed: February 17, 1988

Before LAY, Chief Judge, HEANEY and BOWMAN, Circuit Judges.

LAY, Chief Judge.

In *Linquist v. Bowen*, 813 F.2d 884 (8th Cir. 1987), this court upheld the district court's decision in a nationwide class action concerning the provisions under the Social Security Act, 42 U.S.C. §§ 301-1397f (1982) and the Railroad Retirement Act, 42 U.S.C. §§ 201-231v (1982) that each required an offset against an individual's benefits of fifty cents for each dollar the individual earned in excess of the exempt amount. The plaintiff class asserted that retired persons covered by both Acts should have

their benefits reduced by only a single fifty-percent offset even though each statute separately required such an offset. The district court ordered that the agencies collect a total of only fifty percent in offsets and required retroactive refunds of benefits back to 1972 for those who had had two offsets collected from their benefits. The Secretary obtained from this court a stay of the district court order pending appeal. In addition to its challenge of the merits, the government raised several jurisdictional arguments. This court sustained jurisdiction over both the Secretary and the Board under mandamus. 813 F.2d at 888.

After oral argument and full review of the record, this court affirmed the judgment of the district court. We held that applying both offsets would fail to serve the overriding congressional intent to encourage the elderly to continue working. In sustaining the district court we disagreed with the District of Columbia Circuit Court of Appeals, which reached the opposite result in *Burns v. United States R.R. Retirement Bd.*, 701 F.2d 193 (D.C. Cir. 1983) (Judge MacKinnon dissented from that court's decision). The government acquiesced in our judgment and did not petition for certiorari.

Thereafter the counsel for the plaintiff class, the Legal Aid of Western Missouri and the National Senior Citizens Law Center, moved for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(b) and (d). On September 1, 1987, this court overruled the government's objection and found that the claimant class had successfully established a common benefit for a class of some 2,000 people and that as such plaintiffs were entitled to a fee "to the same extent that any other party would

be liable under the common law." This court did not reach the question as to whether plaintiffs were entitled to recover attorney's fees under 28 U.S.C. § 2412(d).

We now vacate our order of September 1, 1987, and hold that plaintiffs' attorneys have not demonstrated a legal basis permitting recovery under either section 2412 (b) or section 2412(d).

Section 2412(d)[1]

Although counsel has urged on rehearing that the plaintiff class is entitled to attorney's fees under section 2412(d) because the government was not substantially justified in its conduct in withholding payment and in its litigation defense, we cannot agree. The test for substantial justification was set forth in *United States v. 1,378.65 Acres of Land,* 794 F.2d 1313 (8th Cir. 1986). In that case we said: "In meeting that standard, we conclude that the Government now must show not merely that its position was marginally reasonable; its position must be clearly reasonable, well founded in law and fact, solid though not necessarily correct." *Id.* at 1318 (footnote omitted). We find that the government, although in error in assessing

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[1]That section states in part:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d) (1) (A).

the one hundred-percent offset accumulated under both statutes, was neither litigating in bad faith nor without substantial justification for its position.

In the litigation in this court the government not only challenged the statutory interpretation of both acts but also challenged the jurisdiction of both the district court and this court to pass upon the claim. These jurisdictional arguments are set forth in our prior opinion. Although we ruled against the government on those issues as well, we cannot say that the government either acted in bad faith or was without substantial justification in raising those jurisdictional challenges. In addition, as we appraise the merits of the case, we find that three judges of this court felt the issue on the merits was sufficiently close to enter an order staying the effects of the district court's order of relief. That stay order remained in effect until our opinion was entered.

Throughout the litigation, the government urged that the analysis made by our sister circuit in the District of Columbia was correct. We note that a distinguished panel of judges sat on the appeal in the District of Columbia, and although we did not agree with that panel's holding, it is difficult for us to say that their analysis was lacking in persuasive effect or reason. We found the issue on the merits to be a close one and although we gave great import to the analysis of the government and the D.C. Circuit we felt the more persuasive reason and analysis compelled the opposite result. Under these circumstances, it would be difficult for us to say that the government's position was not substantially justified so as to entitle plaintiffs to recover attorney's fees under 28 U.S.C. § 2412(d).

Section 2412(b)[2]

We now turn to the argument concerning section 2412 (b). That section permits recovery of attorney's fees by a successful litigant in a suit against the government "to the same extent that any other party would be liable under the common law * * *." There are three recognized exceptions to the American rule[3] which the plaintiffs may assert in order to recover attorney's fees under that subsection. In the legislative history relating to the passage of section 2412(b), the committee report makes reference

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[2]That section states:

> (b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

28 U.S.C. § 2412(b).

[3]The American rule disallows an award of attorney's fees to a prevailing party, absent express statutory authority. The rule in England has permitted a successful plaintiff to recover his fees since 1278. "Statute of Gloucester, 1278, 6 Edw. 1, c.1. This statute, which expressly mentioned only 'the costs of his writ purchased,' was from the outset liberally construed to encompass all legal costs of suit, including counsel fees." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 n.7 (1967). For a detailed history of the development of the American rule and its exceptions see *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-70 (1975).

to the liability of the United States for fees under "bad faith", "common fund", and "common benefit" theories.[4]

Under 28 U.S.C. § 2412(c)(2) Congress has expressly stated that the agencies themselves are not directly responsible for any fees awarded under section 2412(b) unless there is a finding of bad faith. Absent such a finding, section 2412(c)(2) states that the fees are to be paid by the Treasury. The legislative history clarifies that this is the intended result:

> To allow recovery of fees from the agencies or from the U.S. Treasury, and to authorize appropriations for that purpose. The Senate bill had provided that funds for most of this bill come from the agencies involved, and that no appropriations could be made for this specific purpose. This restriction was opposed as unduly punitive (there is an accounting procedure in the reporting section), and would result in a forced appropriation. This amendment insures that the prevailing party will be awarded a fee if it meets the requirements in the bill. It also keeps the language providing payment for "bad faith" actions by the agency involved.

H.R. 96-1418, 96th Cong. 2d Sess. 12, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4984, 4991.

The common fund theory permits a successful litigant to recover attorney's fees from the fund created by the litigation. The attorney's fees are thus paid proportion-

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[4]We need not pause long on the bad faith exception because of our foregoing analysis under section 2412(d). The bad faith exception under section 2412(b) is not an enlargement of that exception under section 2412(d), other than the fact that section 2412(d) contains limitations on the party and on the amount of the recovery which are absent from section 2412(b).

ally by the non-litigating members of the class.[5] There is thus a more direct sharing in the award of attorney's fees by all the members of the class who benefited from the plaintiff's efforts. Thus it is somewhat anomalous to say that fees are charged against the government in that instance. Under a common fund theory, the primary benefit to be derived by a plaintiff class from section 2412(b) is that the fee may be awarded when the action is against the United States. In that sense, the United States waives its sovereign immunity to allow the claim for such fees. The D.C. Circuit has recognized the common fund theory, but a contrary result has been reached by the Tenth Circuit which said the common fund exception cannot be asserted against the United States, because the fundamental theory of the common fund recovery is not compatible with the fact that the United States Treasury would have to pay the attorney's fees. *Compare Puerto Rico v. Heckler,* 745 F.2d 709 (D.C. Cir. 1984) *with Jordan v. Heckler,* 744 F.2d 1397 (10th Cir. 1984). As noted above we need not decide the applicability of the common fund theory as counsel waived recovery under that theory. *See* n.5, *supra.*

There are two other possible theories upon which the plaintiff might prevail under section 2412(b), assuming that the theories are recognized at common law. The first of these two possible theories is the common benefit theory under which this court originally awarded the fees; the

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[5]At oral argument, appellees' counsel stated that they would be reluctant to assess a fee against the plaintiff class and in that sense we understand counsel to have expressly waived any desire to assert a claim to a fee against a common fund composed of the retroactive benefits or prospective benefits that the class might have.

other possibility is if there is some equitable theory available to plaintiffs as private attorneys general.

The Supreme Court's decisions in *Hall v. Cole*, 412 U.S. 1 (1973) (union member challenged his expulsion; entire union benefits; "dispell[ed] the 'chill' cast upon the rights of others." *Id.* at 9) and in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) (derivative action challenging proxy statement) recognize a recovery under the common benefit theory. There is no question that the plaintiff class has established a common benefit for a class of some 2,000 people. In this sense we find the suit has served public policy and that there is much merit in Linquist's argument that there is public good in the requirement that the agency comply with the statutory mandate of Congress. The difficulty we encounter in extending these suits to the present situation is that the common law basis of the common benefit theory envisioned a fee-shifting to the unnamed beneficiaries of the litigation. In *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116 (1974), the Court stated:

> We have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, or where a successful litigant has conferred a substantial benefit on a class of persons *and the court's shifting of fees operates to spread the cost proportionately among the members of the benefited class.*

Id. at 129-30 (footnotes omitted; emphasis added).

The plaintiff class urges that the instant case is analogous to *Kiser v. Miller*, 364 F. Supp. 1311, 1320 (D.D.C. 1973), *aff'd on this point sub nom., Kiser v. Huge*,

517 F.2d 1237, 1257 (D.C. Cir. 1974). In *Kiser,* suit was brought against certain pension trustees to require compliance with their obligations to equitably administer retiree benefits. The court awarded attorney's fees on the basis that there was bad faith on the part of the trustees and added as well that "the entire Fund benefited from this suit with the prevention of general fiduciary abuse and improvement of the institutional functioning of the Fund as an entity." *Kiser,* 364 F. Supp. at 1321.

Recovery against the government has been denied in several decisions even though there was a public benefit. The common benefit rule failed because of the inability of the class to share in the proportional cost of the litigation. As the government argues, if the fee is to be paid by the United States then all taxpayers must share in the fee and not just those that are benefited by the specific action brought in the instant case. This was the basis of the rejection of the common benefit theory in *Jordan v. Heckler,* 744 F.2d 1397 (10th Cir. 1984), wherein plaintiff class brought suit against the Secretary to discharge certain statutory obligations and alleged that the procedure followed by the Secretary in handling claims by beneficiaries constituted a misuse of funds. In disallowing attorney's fees, that court quoted both *Mills* and *Hall* and stated:

> In *Mills* the court determined that with the fees paid by the corporation, the benefits of the merger suit would be proportionately spread among the shareholders which was [sic] the group benefited. In the union case, *Hall v. Cole,* 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702, the benefits under the disclosure act obtained by the action accrued to each union member and payment out of union funds according to the Court "shift[s] the costs of litigation to 'the class that has benefited. . . .' " Thus the costs are spread among the

> group members who have benefited and spread in a reasonable and fair manner. The "spreading" of the burden in the case before us was not among the group which was benefited but placed on a much larger group, most of whom had no interest.

Jordan, 755 F.2d at 1400. The same analysis was made by the D.C. Circuit in *Grace v. Burger*, 763 F.2d 457 (D.C. Cir.), *cert. denied*, 474 U.S. 1026 (1985). That court stated:

> "Unlike in *Hall* and *Mills*, the defendant, United States, is more than just a representative of all the beneficiaries of the litigation. An award of attorney fees would ultimately be born[e] by all taxpayers, rather than just those benefiting from the injunctive order. As such, . . . the common benefit theory is inapplicable in cases such as this where plaintiffs seek injunctive relief against the government. [Citations omitted.]
>
> ". . . The common benefit theory is designed to avoid unjust enrichment of beneficiaries to a law suit who are not named plaintiffs. An award of fees here would not compel the beneficiaries to compensate the winning litigant who acted as their representative, but would assess costs against the unrelated losing party. This, clearly, is inconsistent with the American rule and the common benefit exception."

Id. at 459-60 (quoting *Trujillo v. Heckler*, 587 F. Supp. 928, 930-31 (D. Colo. 1984)).

In essence what the plaintiffs seek here is a recovery as private attorneys general, those who sue the government and vindicate the public right, similar to that sought by counsel in the landmark decision in *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Although *Alyeska* was decided prior to the amendment of section

2412 it does demonstrate that the common benefit theory and the private attorney general theory are to be fashioned by Congress rather than by the courts. In *Alyeska*, the Supreme Court noted:

> "[T]his litigation may well have provided substantial benefits to particular individuals and, indeed, to every citizen's interest in the proper functioning of our system of government. But imposing attorneys' fees on Alyeska will not operate to spread the costs of litigation proportionately among these beneficiaries. . . ."

Id. at 245 n.14 (quoting that case in the court below *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1029 (D.C. Cir. 1974)). Nonetheless, in that case, the D.C. Circuit did award fees under the private attorney general rationale on the basis that the class had acted to "vindicate important statutory rights of all citizens * * *." *Wilderness Society*, 495 F.2d at 1032. "Acting as private attorneys general, not only have they ensured the proper functioning of our system of government, but they have advanced and protected in a very concrete manner substantial public interests." *Id.* at 1036. The court of appeals concluded, however, that sovereign immunity precluded an assessment of those fees against the United States. That court thus ordered the private defendant to pay one half of the attorneys' fees and ordered that the plaintiffs must absorb the other half. Its rationale was that there was no Congressional authorization to award fees against the United States. This decision was reached prior to the amendments to section 2412.

In discussing fee-shifting statutes in *Alyeska*, the Supreme Court stated:

> But congressional utilization of the private-attorney-general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award.

Alyeska, 421 U.S. at 263. Even though the class here has acted to vindicate important statutory rights of all, such cannot be the basis for an award of attorney's fees absent congressional authorization.

The fundamental question now remains as to whether or not the passage and amendment of section 2412(b) should vindicate the D.C. Circuit by being construed as a statute that should allow recovery as a private attorney general. The Supreme Court has yet to pass on this question.

The legislative history of section 2412 perhaps suggests that Congress intended to make a statutory exception against the United States under a private attorney general theory. For example, the House Report recites:

> The exception created by S. 265 focuses primarily on those individuals for whom cost may be a deterrent to vindicating their rights. The bill rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy. An adjudication or civil action provides a concrete adversarial test of Government regulation and thereby insures the legitimacy and fairness of the law. An adjudication, for example, may show that the policy or factual foundation underlying an agency rule is erroneous or inaccurate, or it may provide a vehicle for developing or announcing more

> precise rules. The bill thus recognizes that the expense of correcting error on the part of the Government should not rest wholly on the party whose willingness to litigate ar [sic] adjudicate has helped to define the limits of Federal authority. Where parties are serving a public purpose, it is unfair to ask them to finance through their tax dollars unreasonable Government action and also bear the costs of vindicating their rights.

H.R. 1418, 96th Cong., 2d Sess. 10, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4984, 4988-89.

Further analysis of this report, however, demonstrates that this language must be read in conjunction with section 2412(d) rather than section 2412(b). Immediately following the quoted section, the report discusses the language of the substantial justification rule and then states that where the government can show that its case had a reasonable basis both in law and fact no award will be made. *Id.* at 4989.

Our analysis under the common benefit theory, which comports with the other circuit courts, is that such a theory cannot prevail against the United States except perhaps in the narrow situation where a taxpayer suit is brought to challenge the expenditure under a federal statute.[6] Taxpayer suits against the government have had a checkered

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[6]This court en banc has held that subsection (b) does not apply in a suit brought against the Veterans Administration where the attempt to collect attorney's fees was arguably analogous to a section 1983 action brought against state officials. *Premachandra v. Mitts*, 753 F.2d 635 (8th Cir. 1985) (en banc). There, this court held that because the plaintiff did not allege that defendants acted under color of state law no liability could be found under section 1983. Thus the action was not brought to enforce a provision enumerated under section 1988.

existence on the issue of standing. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Flast v. Cohen*, 392 U.S. 83 (1968); *Frothingham v. Mellon*, 262 U.S. 447 (1923).

Our analysis made here is to express our general concern that the amendment to the Equal Access to Justice Act under section 2412(b) serves little purpose. It certainly does not vindicate those litigants who seek to challenge erroneous governmental action as here in that attorney's fees must be borne by the successful litigant even though a broader class of people benefit. In this sense, based upon the analysis of all of the various cases under section 2412(b) it would seem that section 2412(b) serves as a seldom-authorized basis upon which any attorney's fees can be awarded. In this sense, the judicial interpretation of it may be a perversion of the intent of Congress. However, notwithstanding that intent as expressed in the floor debate,[7] and as manifested in the reports of both

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[7]During the Senate debate on the amendment, Senator Dominici discussed the rationale for payment from the Treasury, which presumed that section 2412(b) would be applicable in suits brought against the government to vindicate an individual's rights:

> I am not terribly concerned if it ends up costing a few million dollars. In fact in circulating this amendment, there was a great deal of enthusiasm and some said I should put another clause in it to say that any agency that is the loser to this citizen will take these attorneys' fees out of their budget. I almost put that in there, but I want the Senate to know that it is not. It will have to be paid for out of general appropriations.
>
> But the Senators who suggested the latter said that would be even more of a deterrent, because if OSHA found

(Continued on following page)

houses of Congress the courts must interpret the express language of the statute. Here the court is left to an analysis of exceptions that exist at common law and not exceptions that exist by reason of statutory enactment of

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(Continued from previous page)

> themselves paying $2 million in attorneys' fees because they got beaten for some of their fines that are unreasonable, or thier [sic] rules that are out of line, or if EPA got the same, or any of the other myriad Federal agencies, maybe they would begin to look at their fieldmen and say, "Hey, you are costing us money by doing things that the courts end up saying you are wrong on." I admit that might be more of a deterrent, but in this case, I shall settle for the general kind of funding such as that provided for our poor in this legal services bill. But in this case, I say, provide it to the taxpayer, the average American that is burdened, so he will really be made whole when he has to fight with his Government and wins. Then, admittedly, I want to build a little enthusiasm in the average American to fight some bureaucracy without figuring that, if they win, they lose. Because, at least in this instance, if they win, they will get their attorney's fees and costs and professional witnesses and witness' fees paid for by that very Government that they thought started out benevolent in these laws, with high-sounding goals that end up, rather frequently, on the opposite side of that, harassing and bothering the average American for no good.

126 Cong. Rec. 28,845 (1980). Senator Dominici later expanded upon these remarks and directly addressed the situation presented by Linquist:

> There have been numerous documented cases of conflicting regulations in areas of overlapping jurisdiction of various agencies. Regulations have proliferated as agencies have expanded their jurisdiction, unchallenged, through regulatory fiat.
>
> This bill will, as Elihu Root said, allow the agencies of regulation to be regulated by those affected by their regulation. Those who are affected by regulations will be given the incentive to challenge such regulations. Today, the prevailing attitude is, "if I win in court, I still lose because of the cost."

126 Cong. Rec. 28,846 (1980).

specific instances. *See Alyeska,* 421 U.S. 247-71. The fact remains that the common law theories of common fund and common benefit simply are not applicable against the United States in this instance and, therefore, it would seem that the language used by Congress in section 2412(b) has very little utility to the litigant who seeks to challenge erroneous governmental application of congressional laws.

Based on the foregoing analysis, we hereby vacate our order of September 1, 1987, and disallow an award of attorney's fees to the plaintiff class.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

LOIS LINQUIST and ALBERTA E. BURNS,	)	
Plaintiffs,	)	No. 80-0698-CV-W-9
v.	)	
OTIS R. BOWEN, Secretary of the Department of Health and Human Services, and UNITED STATES RAILROAD RETIREMENT BOARD,	)	
Defendants.	)	

MEMORANDUM AND ORDER

(Filed January 31, 1986)

This case currently is pending on cross motions for summary judgment. Assuming that various procedural problems are resolved favorably to plaintiffs, this case presents the question whether plaintiffs who receive benefits under both the Social Security Act (SSA) and the Railroad Retirement Act (RRA) can have their benefits reduced by more than fifty percent of the amount their earned income in any year exceeds the exempt earnings amount. Plaintiffs state that during 1974 (Burns) and 1977 (Linquist) both the Secretary of the Department of Health, Education and Welfare in her capacity as Administrator of the Social Security Act (Secretary) and the Railroad Retirement Board (Board) reduced their benefits by fifty percent of their excess earnings resulting in a loss of $1 of benefits for every $1 in excess earnings.

Plaintiffs argue that this dollar-for-dollar loss of benefits violates: 1) the intent of Congress; 2) the equal protection and due process clauses of the United States Constitution; and 3) the principles of equitable estoppel. Plaintiffs seek a determination that the Administration and the Board jointly can offset against benefits no more than fifty percent of plaintiffs' excess earnings.

FACTS

In 1977 plaintiff Lois Linquist (Linquist) received survivor benefits under the RRA based on the work record of her deceased husband and primary benefits under the SSA based on her own work record.

During 1977 Linquist earned $3,415. Under both the SSA and RRA $3,000 was the amount of exempt earnings in 1977. Therefore, Linquist had $415 in excess earnings. On March 8, 1978, the Board notified Linquist that the Board had overpaid her $207 in 1977, approximately fifty percent of her excess earnings for 1977. Linquist was directed either to refund the overpayment to the Board or the overpayment would be recouped from her annuity benefits. One week after being notified of the overpayment, Linquist paid $207 to the Board. Linquist did not appeal the Board's action.

Approximately seven months later on October 11, 1978, the Secretary notified Linquist that her Social Security benefits had been overpaid $207 as a result of her excess earnings in 1977. Linquist was advised that $207 would be deducted from her Social Security benefits for November, 1978.

Having already repaid fifty percent of her excess earnings to the Board, Linquist administratively appealed the Secretary's determination that she was obligated to

repay the remaining fifty percent of her excess earnings to Social Security. Linquist filed an extensive brief supporting her challenge to the Secretary's threatened action. The Administrative Law Judge (ALJ) refused to grant Linquist's request that the Secretary waive recovery of the overpayment, giving only cursory treatment to plaintiff's legal arguments.

On June 5, 1980, the Appeals Council concluded that there was no basis for reviewing the hearing decision. In its form order, the Appeals Council concluded that there was no error of law and there was no "broad policy or procedural issue which may affect the general public interest." Having exhausted all administrative remedies provided under the SSA, Linquist filed a complaint in this Court asserting that she should not have to repay the SSA the remaining fifty percent of her excess earnings after already having paid fifty percent to the Board.

The identical claims of Alberta E. Burns (Burns) arose differently. In 1974 Burns received primary benefits from Social Security based on her own work record and survivor benefits from the Board based on the work record of her deceased husband. During 1974 Burns also earned $3,800. In 1974 $2,400 was the amount of exempt earnings under both the SSA and RRA. Therefore, Burns' excess earnings for 1974 were $1,400.

On November 18, 1975, Burns was notified by Social Security that she had been overpaid by $744, approximately fifty percent of her 1974 excess earnings.[1] Social Security collected the overpayment by withholding Burns' benefits for January, February and part of March 1976.

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[1] The recoupment notice states that Burns had $3,888 in excess earnings rather than $3,800. Therefore, the benefit offset was $744 rather than $700. Administrative record at 35-36.

Burns did not appeal administratively this action by Social Security.

On March 27, 1978, Burns was notified by the Board that her 1974 excess earnings had created a $700 overpayment in Railroad Retirement benefits. The Board recouped the $700 overpayment by suspending Burns' annuity benefits for four and one-half months beginning in June 1978. Because the $700 recoupment by the Board took the remaining fifty percent of Burns' 1974 excess earnings, she contested the Board's action under applicable administrative procedures. On December 11, 1980, the Board issued its final determination denying Burns' appeal.

On December 8, 1981, Burns was granted leave to intervene in this action. Burns also sought review of the Board's December 11, 1980, decision in the United States Court of Appeals for the District of Columbia. On February 25, 1983, the District of Columbia Court of Appeals rejected Burns' contention that the Board improperly recouped the remaining fifty percent of her excess earnings for 1974. *Burns v. United States Railroad Retirement Board*, 701 F.2d 193 (D.C. Cir. 1983).[2]

I. *JURISDICTION*

A. *Exhaustion of Administrative Remedies*

There is no dispute that each plaintiff has exhausted the administrative remedies provided by the agency that

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[2] The District of Columbia Circuit Court of Appeals decided the issues presented by *Burns* in two separate opinions. The first *Burns* opinion, *Burns v. United States Railroad Retirement Board*, 701 F.2d 189 (D.C. Cir. 1983) (hereafter Burns (class)) decided the issue of class certification. The second *Burns* opinion, *Burns v. United States Railroad Retirement Board*, 701 F.2d 193 (D.C. Cir. 1983) (hereafter Burns (merits)) decided the merits of the case.

offset against benefits the second fifty percent of each plaintiff's excess earnings. However, neither plaintiff has exhausted the administrative remedies of the agency that offset against benefits the first fifty percent of her excess earnings. For this reason, defendants argue that neither plaintiff has exhausted available administrative remedies.

Both the SSA and RRA require exhaustion of administrative remedies before judicial review is sought. A person can obtain judicial review of a Social Security decision only after the Secretary has rendered a final decision. 42 U.S.C. § 405(g). Similarly, judicial review of Board decisions can occur only after all administrative remedies have been exhausted. 45 U.S.C. § 355(f).

In *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893 (1976), the Court concluded that the claimant was not required to raise with the Secretary of Health, Education and Welfare his constitutional claim to a pretermination hearing before asserting it in federal court.

> The fact that Eldridge failed to raise with the Secretary his constitutional claim to a pretermination hearing is not controlling. As construed in *Salfi,* § 405(g) requires only that there be a "final decision" by the Secretary with respect to the claim of entitlement to benefits. Indeed, the named appellees in *Salfi* did not present their constitutional claim to the Secretary. *Weinberger v. Salfi,* O.T.1974, No. 74-214, App. II, 17-21. The situation here is not identical to *Salfi,* for, while the Secretary had no power to amend the statute alleged to be unconstitutional in that case, he does have authority to determine the timing and content of the procedure challenged here. 42 V.S.C. § 405(a) [sic]. We do not, however, regard this difference as significant. It is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an

adjudicatory context. The Secretary would not be required even to consider such a challenge.

. . .

Eldridge's constitutional challenge is entirely collateral to his substantive claim of entitlement.

Id. at 329-30, 96 S.Ct. at 900 [footnote omitted].

In *Jensen v. Schweiker,* 709 F.2d 1227 (8th Cir. 1983), *appeal after remand sub nom. Jensen v. Heckler,* 766 F.2d 383 (8th Cir. 1985), *cert. denied sub nom., Jensen v. Heckler,* 106 S.Ct. 311 (1985), the Court relying on *Eldridge* concluded that Jensen was not barred from raising his constitutional challenge to a statute prohibiting payment of Social Security benefits to a person in prison on a felony conviction because the claim had not been raised before the Secretary.

This Circuit has followed *Eldridge* in holding that a federal court has jurisdiction to hear a challenge to a Social Security regulation under § 405(g) as long as the challenge is collateral to the substantive claim and presents a colorable constitutional claim. *Gipson v. Harris,* 633 F.2d 120, 122 (8th Cir. 1980); *see Himmler v. Califano,* 611 F.2d 137, 148 (6th Cir. 1979).

. . .

Eldridge requires a claim to be collateral to the substantive issue of entitlement and to present a colorable constitutional challenge. Whether a claim is collateral to the substantive claim of entitlement depends on whether the claim is unrelated to any controverted factual question of entitlement. Here, under § 423(f) Jensen is clearly not entitled to benefits. Further, there is no dispute that Jensen meets all other requirements of the Act and would, but for his incarceration, be receiving benefits. Like the situation in *Eldridge,* 424 U.S. at 331-32, 96 S.Ct. at 900-01, and unlike that in *Salfi,* 422 U.S. at 762, 95 S.Ct. at 2465, there was no reason besides the challenged statute for suspending benefits, and no alternative basis for con-

> tinuing to provide benefits. We conclude that Jensen's claim is collateral to his substantive right to Social Security benefits.

Id. at 1229-30.

In *Finnerty v. Cowen*, 508 F.2d 979 (2nd Cir. 1974), plaintiff received benefits under both the Social Security Act and the Railroad Retirement Act. As a result of excess earnings in 1970, first Social Security and then the Board took action to recoup overpaid benefits. Plaintiff challenged the double deduction from benefits of excess earnings by the Social Security Administration and by the Railroad Retirement Board. The district court dismissed the complaint for failure to exhaust and for lack of subject matter jurisdiction. The Court of Appeals held that it was error to dismiss Finnerty's complaint for failure to exhaust her administrative remedy. *Id.* at 983. Plaintiff argued that because her attack was on the procedure used by the Board (the second agency recouping overpaid benefits), she should not have to follow the administrative appeals procedure.

> According to appellant, the administrative process within the Railroad Retirement Board could not resolve whether these administrative procedures violated the Constitution or the relevant statute and regulations. Similarly, the agency itself could not declare unconstitutional those portions of the Railroad Retirement and Social Security Acts that allegedly discriminate against persons in Mrs. Finnerty's class. Thus, appellant argues, she was not required to pursue any administrative remedies.

Id. at 982.

The Court of Appeals agreed with plaintiff.

> We believe that appellant is correct. Federal agencies like the Board "have neither the power nor

> the competence to pass on the constitutionality of administrative or legislative action," [citations omitted] since the agency is not called upon to determine facts or to apply its expertise.

Id. [footnote omitted].

Here, as in *Eldridge* and *Jensen,* there is no risk of premature interruption of the administrative process which is the primary purpose of requiring exhaustion of administrative remedies. Both the Board and the Secretary had already developed the factual record and exercised their discretion on the question of entitlement to benefits; in fact, both plaintiffs were receiving benefits during the years in which they had excess earnings. Once the lawful formula for offsetting excess earnings against benefits has been determined, the amount of the deduction will not involve the exercise of administrative discretion. As demonstrated by *Jensen,* just because the outcome of this dispute may affect the amount of benefits does not mean that there is a substantive issue of entitlement to benefits. Therefore, the claims being asserted by plaintiffs are collateral to any substantive issue of entitlement to benefits.

Because the issues raised do not involve the determination of facts or the application of the defendants' administrative expertise, defendants lack the competence and experience to pass on them. Understandably, therefore, the legal issues presented by Linquist at the administrative level were given only the most summary treatment by the ALJ in his decision.

Furthermore, as the history of plaintiffs' claims demonstrates, exhaustion of the administrative remedies provided by both the Board and Secretary followed by effec-

tive judicial review is virtually impossible. Defendants do not coordinate the deduction of excess earnings. Therefore, the administrative and judicial review could well be completed for the first fifty percent deduction before the recipient would even know the second fifty percent is going to be claimed.

Finally, as demonstrated by the analysis that follows and by the majority and dissenting opinion in *Burns*, plaintiffs present colorable challenges to the legality of defendants' application of the excess earnings deduction.

For the foregoing reasons, to require exhaustion of administrative remedies would be both futile and unnecessary.

B. Mandamus

Title 28 U.S.C. § 1361 provides that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

1. Duty Owed to Plaintiffs

Defendants argue that mandamus is inappropriate because plaintiffs cannot establish that either the Board or the Administration owed a clear ministerial duty to plaintiffs. Plaintiffs assert that the only dispute in this case is over the nature of defendants' duty to plaintiffs, i.e., whether defendants are constitutionally and statutorily obligated to allow plaintiffs to retain fifty percent of their excess earnings. Once the nature of defendants' duty is determined, the performance of that duty by defendants

is absolute; they have no discretion to do other than the constitution and statutes require.

In *Elliott v. Weinberger*, 564 F.2d 1219 (9th Cir. 1977), *aff'd in part and rev'd in part on other grounds, sub nom. Califano v. Yamasaki*, 442 U.S. 682, 99 S.Ct. 2545 (1979), plaintiffs asserted that the procedures used by the Secretary in recouping excess payments violated their due process rights. The Secretary claimed that mandamus jurisdiction was not appropriate. In rejecting the Secretary's argument, the Court stated that mandamus is available even if there is a dispute about the nature of the legal duty. The essential element of mandamus jurisdiction is that once the duty is defined by the Court, the agency has no discretion in discharging that duty.

> Thus the trial courts properly found jurisdiction [pursuant to the federal mandamus statute, 28 U.S.C. § 1361]. Here we are concerned with the *duty* of the Secretary to provide certain minimum due process notice and hearing opportunities to Social Security recipients subject to recoupment [citations omitted]. It is a strict fifth amendment issue, and the question of discretion does not arise. The Secretary has either met his constitutional duty to provide a certain minimum, or he has not. He has no discretion to provide less than that constitutionally required.

Id. at 1226.

Similarly, in *Belles v. Schweiker*, 720 F.2d 509 (8th Cir. 1983), it was argued that mandamus jurisdiction was improper because the Secretary had no clear duty to act. In rejecting this argument, the Court observed that whether the Secretary had a clear duty to act "would entail an analysis of the merits of appellant's whole case." *Id.* at 513. Therefore, in order to determine whether mandamus

jurisdiction is available, the allegations of the complaint are taken as true unless they are patently frivolous. Taking Belles' allegations as true that she was entitled to notice and hearing before overpayments were recouped, the Court affirmed the trial court's conclusion that it had jurisdiction under § 1361. *Id.*

Here taking the allegations of the complaint as true, the Secretary and the Board have a duty not to recover more than fifty percent of plaintiffs' excess earnings. Therefore, mandamus would lie to compel the Board and the Secretary to comply with their duty. As in *Elliott*, questions of Congressional intent and constitutional requirements are the essence of this dispute; questions of administrative discretion do not arise.

2. 42 U.S.C. § 405(h) Does Not Preclude Judicial Review Pursuant to 28 U.S.C. § 1361

The Secretary argues that § 205(h) of the Social Security Act, 42 U.S.C. § 405(h), precludes § 1361 jurisdiction. Section 405(h) provides:

> The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.

Even though the Supreme Court in *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457 (1975), held that 42 U.S.C. § 405(h) precludes judicial review of administrative ac-

tion on claims for Social Security benefits pursuant to federal question jurisdiction (28 U.S.C. § 1331), the Supreme Court has on at least three occasions left open the question of whether § 1361 jurisdiction was available. *Califano v. Yamasaki*, 442 U.S. 682, 698, 99 S.Ct. 2545, 2556 (1979); *Norton v. Mathews*, 427 U.S. 524, 529-30 96 S.Ct. 2771, 2774-75 (1976); *Mathews v. Eldridge*, 424 U.S. 319, 332 n.12, 96 S.Ct. 893, 901 n.12 (1976).

However, other courts have recognized that mandamus jurisdiction is available to review procedures employed in administering the SSA. *Ellis v. Blum*, 643 F.2d 68 (2d Cir. 1981); *Belles v. Schweiker*, 720 F.2d at 512; *Mental Health Ass'n of Minnesota v. Heckler*, 720 F.2d 965, 971 n.17 (8th Cir. 1983); *Lopez v. Heckler*, 725 F.2d 1489, 1507-08 (9th Cir. 1984), *vacated on other grounds*, 105 S.Ct. 583 (1984).

In *Belles*, the Court concluded that § 405(h) does not preclude mandamus jurisdiction when plaintiffs' claims raise essentially a procedural challenge. *Belles*, 720 F.2d at 512. "A decision favorable to Belles would not entitle her to benefits, but would instead give her a right to notice and a prerecoupment hearing. Accordingly, § 405(h) is not controlling." *Id.* [footnote omitted]. Similarly, in *Mental Health Ass'n of Minnesota v. Heckler*, 720 F.2d at 971 n.17, the Court relying on the "strength of the reasoning" in *Ellis* concluded that mandamus jurisdiction over the Secretary was appropriate where the claim raised was procedural in nature and where the district court's order did not infringe on the Secretary's delegated authority to make eligibility determinations.

As in *Ellis*, *Belles* and *Mental Health Ass'n of Minnesota*, this case also raises a procedural issue that does

not affect the substantive question of entitlement to benefits. Both Linquist and Burns have already been found eligible for Social Security benefits. Therefore, § 405(h) does not preclude § 1361 mandamus jurisdiction over plaintiffs' claims against the Secretary.

C. Jurisdiction in District Court Over the Railroad Retirement Board

Section 5(f) of the Railroad Unemployment Insurance Act,[3] 45 U.S.C. § 355(f), provides that the appropriate Court of Appeals shall review final decisions of the Board.

> Any claimant . . . or any other party aggrieved by a final decision under subsection (c) of this section, may, only after all administrative remedies within the Board will have been availed of and exhausted, obtain a review of any final decision of the Board by filing a petition for review . . . [in the appropriate federal court of appeals].

Defendants argue that where Congress has provided specific statutory review procedures those procedures are exclusive. Defendants rely primarily on *Denberg v. Railroad Retirement Board*, 696 F.2d 1193 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 1706 (1984). Denberg had been denied spouse's benefits under the Railroad Retirement Act and could have pursued an administrative appeal. Instead he brought suit in federal district court challenging the constitutionality of the different requirements for eligibility of husbands and wives for spouse's benefits under the RRA. The district court's conclusion that it had subject matter jurisdiction pursuant to 28 U.S.C. § 1337 (civil ac-

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[3] Section 5(f) of the Railroad Unemployment Insurance Act, 45 U.S.C. § 355(f), is incorporated by reference into the Railroad Retirement Act of 1974, 45 U.S.C. § 231(g).

tions arising under Act of Congress regulating commerce) was the only question considered on appeal.

The Court of Appeals noted that if § 1337 gives the district court jurisdiction, an applicant for retirement benefits under the Act can choose whether to exhaust administrative remedies and then seek review by a Court of Appeals or "forget about his remedies within the Board and go directly into a district court. . . ." *Id.* at 1195. The Court concluded that "it is against common sense that a disappointed claimant should have a choice whether to seek judicial review in a district court with a right of appeal to the court of appeals, or in a court of appeals in the first place. . . ." *Id.* at 1196.

Furthermore, the Court concluded that § 10(b) of the Administrative Procedure Act, 5 U.S.C. § 703, makes clear that the Court of Appeals is the proper forum for seeking review. Section 703 provides in part:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction.

The Court then concluded that there was "no problem of 'absence or adequacy' of the special statutory review proceeding in . . ." § 355(f). Therefore, the special statutory review proceeding in § 355(f) was exclusive. *Denberg*, 696 F.2d at 1196.

Denberg does not prohibit exercise of jurisdiction by this Court over the Board. First, *Denberg* was a dispute

about entitlement to benefits, the type of dispute intended for initial administrative resolution. Here, as previously discussed, the dispute is not over entitlement to benefits. Second, the instant case is against both the Secretary and the Board while *Denberg* was against the Board only. If the result in *Denberg* were applied to this case, it would be impossible to get jurisdiction over the Secretary and the Board in the same forum because district courts are authorized to review final decisions of the Secretary while Courts of Appeals are authorized to review final decisions of the Board. The impossibility of obtaining simultaneous jurisdiction over the Secretary and the Board caused the District of Columbia Court of Appeals to conclude that "Congress did not intend to create a procedural conundrum of this kind." *Burns* (*class*), 701 F.2d at 192 n.11. Therefore, the special statutory review proceeding in § 355 (f) is inadequate in this situation. As a result, § 10(b) of the Administrative Procedure Act, 5 U.S.C. § 703, specifically excuses compliance with § 355(f).

Third, *Denberg* recognized the needless drain on judicial resources if disappointed benefit claimants could get review in the district court followed by review in the Court of Appeals. 696 F.2d at 1196. Here, however, the issues presented cannot be developed, presented and decided appropriately by the Board. For instance, the factual discovery utilized in this case in this Court is not readily available before the Board. Furthermore, deciding legal issues of the type involved in this case is not the proper function of the Board. *Finnerty,* 508 F.2d at 984. In addition, in *Burns* (*class*), 701 F.2d at 190, the Court stated that Burns' complaint might well have been appropriate for class adjudication had judicial review been commenced

in the district court rather than the Court of Appeals. If this case had gone directly from the Board to the Court of Appeals, the appellate court would not have the benefit of the factual record developed in the trial court by all interested parties, particularly both agencies.

Finally, the Eighth Circuit has recognized implicitly an exception to the § 355(f) review procedure in similar situations. *See Yost v. Schweiker*, 545 F. Supp. 591 (D. S.D. 1982), *aff'd*, 699 F.2d 438 (8th Cir. 1983) (the district court exercised jurisdiction over the Board to consider plaintiff's claim that certain procedures of the Social Security Administration and the Board violated plaintiff's plaintiff's [sic] constitutional rights). *See also Finnerty*, 508 F.2d at 984 (the Second Circuit expressly approved the exercise of jurisdiction over the Board in this type of case).[4]

For the foregoing reasons, this Court has subject matter jurisdiction[5] pursuant to the mandamus statute, 28 U.S.C. § 1361.

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[4] Defendants and *Denberg v. United States Railroad Retirement Board*, 696 F.2d 1193, 1197 (7th Cir. 1983), suggest that *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457 (1975) "demolished" the premise of the jurisdictional analysis in *Finnerty*. No express legislative prohibition exists in the Railroad Retirement Act to the exercise of federal jurisdiction over the Board decisions under § 1361 as the Supreme Court found in 28 U.S.C. § 1331. Section 10(b) of the Administrative Procedure Act, relied upon by *Denberg*, has an express exclusion for this type of case.

[5] Jurisdiction also is asserted under 28 U.S.C. § 1337 (civil action arising under Act of Congress regulating commerce) and 28 U.S.C. § 1331 (federal question). Because of the presence of § 1361 jurisdiction, these alternative grounds for subject matter jurisdiction will not be analyzed. For the reasons stated in *Finnerty v. Cowen*, 508 F.2d 979, 983-84, (2nd Cir. 1974), § 1337 also provides a basis for exercising jurisdiction.

II. RES JUDICATA AND COLLATERAL ESTOPPEL BAR CERTAIN OF BURNS' CLAIMS

Under *res judicata,* a final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been raised in that case. *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 398, 101 S.Ct. 2424, 2428 (1981); *Allen v. McCurry,* 449 U.S. 90, 94, 101 S.Ct. 411, 414 (1980).

In *Burns* (*merits*), 701 F.2d at 193, the statutory and equal protection claims asserted by Burns against the Railroad Retirement Board in the instant case were decided adversely to her. Furthermore, defendant Board argues and plaintiff Burns concedes that the other claims made against the Board here were available to her when she was pursuing judicial review in *Burns.* Therefore, all claims by Burns against the Board will be dismissed.

Defendant Secretary also argues that Burns should be collaterally estopped from asserting her statutory and equal protection claims against him. "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry,* 449 U.S. at 94, 101 S.Ct. at 414; *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 99 S.Ct. 645 (1979).

Collateral estoppel will preclude relitigation of an issue if: 1) the issue is identical to one that was present in a prior adjudication; 2) there was a final judgment on the merits as to that issue; 3) the estopped party was a party to the prior adjudication; and 4) the estopped party was given a full and fair opportunity to be heard on the

adjudicated issue. *Oldham v. Pritchett,* 599 F.2d 274, 279 (8th Cir. 1979). With respect to the Congressional intent and equal protection claims raised by Burns here against the Secretary, the four *Oldham* conditions listed are met. Plaintiff Burns agrees that these two claims against the Secretary should be dismissed.

Burns argues that she should not be estopped from raising in this action her due process and equitable estoppel claims against the Secretary. Defendants agree. Therefore, Burns will not be collaterally estopped from raising her due process and equitable estoppel claims against the Secretary in this action.

III. CLASS CERTIFICATION

Plaintiffs seek certification of the following class pursuant to Rule 23, Federal Rules of Civil Procedure:

> All persons who are receiving or who will receive both Social Security retirement benefits and Railroad Retirement benefits and who have been or will be denied the right to retain 50% of their excess earnings pursuant to the joint actions of the Social Security Administration and the Railroad Retirement Board.

Plaintiff Linquist's Motion to Certify Class, filed June 3, 1981, p. 2.

A. Class Need Not be Restricted to People Who Have Exhausted Administrative Remedies

Defendants assert that the description of the proposed class is fatally deficient because there is no requirement that a person exhaust administrative remedies in order to be a class member. For the reasons already discussed, exhaustion of administrative remedies is not required when

challenging an administrative policy and particularly when challenging the effect of an administrative policy applied by two independent agencies. The application of the excess earnings deduction will be precisely the same on each member of the class, i.e., each member of the class will have had monthly benefits reduced by more than fifty percent of excess earnings. Therefore, the class definition is not fatally defective for not requiring exhaustion of administrative remedies in order to be a class member.

B. Numerosity

Under Rule 23(a)(1), the proposed class must be so numerous that joinder is impracticable. Defendants argue that the numerosity requirement has not been satisfied because the number of potential class members would be limited by the following factors: (1) most annuitants would not apply for both Social Security and Railroad Retirement benefits because they would enjoy no increase in benefits by doing so; (2) the earnings limitation does not apply to recipients over age 72; and (3) the sixty-day limitation in § 405(g) for seeking review of a final Social Security ruling would limit the number of people qualified to join the class.

The determination of whether a class is sufficiently large to make joinder impracticable must be made by the district court "in light of the particular circumstances of the case. . . ." *Arkansas Ed. Ass'n v. Board of Education of the Portland, Arkansas School District,* 446 F.2d 763, 765 (8th Cir. 1971).

A plaintiff need not specify an exact number of class members, but must show only that joinder is impracticable

through "some evidence or reasonable estimate of the number of purported class members." *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038 (5th Cir. 1981).

According to defendants' responses to plaintiffs' interrogatories, approximately 472,000 persons received benefits under both the RRA and the SSA. Of these 472,000, approximately 224,000 were under the age of 72 when the interrogatories were answered and approximately 150,000 were under the age of 70 as of January 1, 1982. (As of January 1, 1982, a beneficiary is exempt from the excess earnings deduction after age 70.) Furthermore, during 1977, approximately 152,000 Social Security recipients were required to forfeit benefits. (The Board has no comparable figures.) Neither the Board nor the Secretary keeps statistics showing the number of recipients subject to excess earnings deductions by both the Board and the Secretary.

The large number of double beneficiaries, together with the large number of Social Security recipients subject to the excess earnings deduction, furnish a reasonable basis for concluding that there is a sufficient number of double beneficiaries subjected to a double deduction of excess earnings to make joinder of each impractical.[6]

C. Commonality

To satisfy the requirements of Rule 23(a)(2), there must be a question of either fact or law common to the

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[6] It is somewhat puzzling why the defendant is challenging the existence of a sufficient number of class members to make joinder impracticable in light of the Board's concession in its brief in *Burns* (dated April 1982, at p.38) that even under the Board's restrictive definition of eligible class members "the numerosity requirement is probably met."

class. In the instant case, the ultimate question is whether the defendants jointly may lawfully recoup more than fifty percent of the excess earnings from dual beneficiaries. This question is applicable to the class as a whole. Furthermore, the differences that exist in the factual background of each claim (most likely restricted to the amount of excess earnings and the amount of benefits) will not affect the outcome of the legal issue. *Califano v. Yamasaki,* 442 U.S. 682, 701, 99 S.Ct. 2545, 2557 (1979). Therefore, the requirements of Rule 23(a)(2) are satisfied.

D. Typicality

The claims of the representative party must be typical of the claims of the class. Rule 23(a)(3). Some courts have considered the typicality requirement of 23(a)(3) superfluous, equating it with the "adequacy" requirement of 23(a)(4) or the "common question" requirement of 23(a)(2). 3B Moore's Federal Practice, ¶ 23.06-2 (2d ed. 1982); *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 157 n.13, 102 S.Ct. 2364, 2370 (1982) (commonality and typicality requirements of Rule 23(a) tend to merge).

In *Donaldson v. Pillsbury,* 554 F.2d 825, 830 (8th Cir. 1977), *cert. denied,* 434 U.S. 856, 98 S.Ct. 177 (1977), the Court stated that Rule 23(a)(3) requires "a demonstration that there are other members of the class who have the same or similar grievances as the plaintiff." Certainly the existence of plaintiff Burns demonstrates that plaintiff Linquist's claims are not unique.

In *Paskel v. Heckler,* 99 F.R.D. 80, 83-84 (E.D.Pa. 1983), the Court differentiated between Rule 23(a)(2) and Rule 23(a)(3) as follows:

> Rule 23(a)(2) assures that there is a shared interest among the class in resolving a certain issue. Rule 23(a)(3) examines whether the named representative's particular claim presents that issue on behalf of the plaintiff class. The relative simplicity of the typicality requirement may be summed up as follows: a plaintiff's claim is typical if it arises from the same event or course of conduct that gives rise to the claims of other class members and is based on the same legal theory.

Here, plaintiff Linquist's claims arise from precisely the same course of conduct that gives rise to the claims of class members, i.e., defendants' recoupment policies which result in the recoupment of $1 of benefits from every $1 of excess earnings of beneficiaries. Consequently, plaintiff Linquist's claims are typical of the claims of the other class members.

E. Adequacy of Representation

Plaintiff Linquist must demonstrate that she will fairly and adequately protect the interests of the class. Rule 23(a)(4). This requirement is satisfied if: (1) there is no antagonistic interests between the named plaintiff and the class members, and (2) plaintiff's counsel are competent to conduct the litigation. *Sperry Rand Corp. v. Larson,* 554 F.2d 868, 873-74 n.17 (8th Cir. 1977), *aff'd on other grounds after remand, sub nom. Elliott v. Sperry Rand Corp.,* 680 F.2d 1225 (8th Cir. 1982); *Wetzel v. Liberty Mutual Ins. Co.,* 508 F.2d 239, 247 (3d Cir. 1975), *cert. denied,* 421 U.S. 1011, 95 S.Ct. 2415 (1975).

Defendants assert that plaintiff Linquist cannot represent all beneficiaries of both the RRA and SSA whose benefits are subject to the excess earnings deduction be-

cause she failed to challenge administratively the Board's fifty percent recoupment of her 1977 excess earnings. As previously discussed, exhaustion of administrative remedies is not a prerequisite to class membership or to the assertion of plaintiff Linquist's claims in this Court. Furthermore, plaintiff Linquist is a dual beneficiary and both defendants asserted a ffty percent deduction for excess earnings against her. Therefore, she has no claim antagonistic to the interests of the class.

Plaintiff Linquist's counsel has had extensive experience in class action litigation. Eg. *United States Railroad Retirement Board v. Fritz,* 449 U.S. 166, 101 S.Ct. 453 (1980), *reh'g denied,* 450 U.S. 960, 101 S.Ct. 1421 (1981). Defendants do not dispute the fact that plaintiff's counsel is competent to protect the interests of the class members.

F. Rule 23(b)(2) Requirements

In addition to meeting all the requirements of Rule 23(a), a proposed class also must satisfy one of the alternative requirements of Rule 23(b). Rule 23(b)(2) requires that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

Rule 23(b)(2) has been used as the basis for class certification in other cases challenging the policies or procedures of governmental agencies, including policies of the Social Security Administration and the Railroad Retirement Board. *United States Railroad Retirement Board v. Fritz,* 449 U.S. at 166, 101 S.Ct. at 453 (challeng-

ing the Board's failure to provide certain benefits to one class of railroad workers while providing them to other railroad workers); *Califano v. Yamasaki*, 442 U.S. at 682, 99 S.Ct. at 2545 (1979) (challenging the Secretary's refusal to grant the opportunity for an oral hearing before recoupment begins in overpayment cases); *Jiminez v. Weinberger*, 523 F.2d 689 (7th Cir. 1975), *cert. denied*, 427 U.S. 912, 96 S.Ct. 3200 (1976) (challenging the denial of Social Security benefits to certain illegitimate children); *Bermudez v. United States Dept. of Agriculture*, 490 F.2d 718 (D.C.Cir. 1973), *cert. denied*, 414 U.S. 1104, 94 S.Ct. 737 (1973) (challenging the Department's denial of retroactive food stamps to recipients whose benefits had been erroneously denied).

Here, defendants have acted towards plaintiff Linquist and all class members in precisely the same manner by asserting against each class member a policy of recouping jointly one hundred percent of excess earnings. Therefore, injunctive or corresponding declaratory relief applicable to the class would be appropriate.

G. Necessity for Class Certification

Defendants argue that even though the Rule 23 requirements for class certification may have been satisfied, class certification is unnecessary because injunctive relief is requested.

If the requirements for class certification have been met, plaintiff Linquist is entitled to class certification. "[T]he Federal Rules of Civil Procedure give the proposed class representatives the right to have a class certified if the requirements of the rules are met." *United*

States Parole Commission v. Geraghty, 445 U.S. 388, 403, 100 S.Ct. 1202, 1212 (1980).

If some further need for class certification were required, it is provided by the non-acquiesence policy of both the Board and the Secretary. In the past, the Secretary has refused to apply decisions in Social Security cases to any claimants except the claimant in the case.

> For several years now, the courts of this circuit have found themselves embroiled in an increasingly frustrating effort to persuade the Secretary to follow their decisions regarding certain legal standards under the disability insurance program. The Secretary, in an apparent effort to reduce the number of disability beneficiaries, has taken a more restrictive approach in recent years in determining eligibility. Often, the Secretary has stuck to this restrictive path even when it has led to direct contravention of federal court edicts. By proceeding in such a manner, the Secretary also has disregarded the fundamental policies at the heart of the disability program. . . .

Polaski v. Heckler, 585 F.Supp. 1004, 1005 (D. Minn. 1984), *aff'd,* 739 F.2d 1320 (8th Cir. 1984), *aff'd after remand,* 751 F.2d 943 (8th Cir. 1984). *See also Levings v. Califano,* 604 F.2d 591 (8th Cir. 1979) and *Hollingsworth v. Schweiker,* No. N81-0035C (E.D.Mo. March 3, 1983) (after the Secretary's unilateral disavowal of *Levings,* a separate action had to be filed which resulted in class-wide relief from the date of *Levings* with the district court restating the obligation of administrative agencies to follow binding precedent). Further, the Secretary has stated that he will not follow district court decisions in other similar cases. For instance, in *Hillhouse v. Harris,* 547 F. Supp. 88, 92 (W.D. Ark. 1982), *aff'd,* 715 F.2d 428 (8th

Cir. 1983), the Court quoted from the Appeals Council's decision in that case: "[T]he Secretary is bound only by the provisions of the Social Security Act, regulations and rulings, and by United States Supreme Court decisions. A district or circuit court decision is binding only in the specific case it decides. . . ."[7] The Board also has refused to apply federal appellate court decisions to other cases raising the same issue of statutory application. See *Frock v. United States Railroad Retirement Board*, 685 F.2d 1041, 1043-44 (7th Cir. 1982), *cert. denied*, 459 U.S. 1201, 103 S.Ct. 1185 (1983).

The legal system cannot afford a "multiplicity of small individual suits for damages" and the aggrieved persons cannot economically obtain redress unless they employ the class action device. *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 339, 100 S.Ct. 1166, 1174 (1980). Therefore, the aggregation of relatively small individual claims in this case where the class members will be the primary beneficiaries of any relief is not only authorized by Rule 23, but is precisely what the rule intended. *Id.; Califano v. Yamasaki*, 442 U.S. at 682, 99 S.Ct. at 2545.

Defendants also oppose class certification on the ground that the class would be nationwide in scope. Al-

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[7] The Secretary has filed an affidavit asserting that the Secretary has no policy of nonacquiesence because in "only 10" out of tens of thousands of court opinions since 1960 has the Secretary chosen to nonacquiesce in judicial opinions. Document No. 22, filed October 31, 1983. The Secretary's repeated failure to follow the decisions of this Circuit in disability determination cases is notorious. Because of the frequency and persistence of the Secretary's refusal to follow the settled law of this Circuit, the conclusion that a policy of nonacquiesence exists is justified regardless of the affidavit.

though the SSA and RRA contemplate case-by-case adjudication, certification of a class is appropriate where certification of a class action is otherwise permissible. *Califano v. Yamasaki,* 442 U.S. at 700, 99 S.Ct. at 2545.

> We concede the force of the Secretary's contentions that nationwide class actions may have a detrimental effect by foreclosing adjudication by a number of different courts and judges, and of increasing, in certain cases, the pressures on this Court's docket. It often will be preferable to allow several courts to pass on a given class claim in order to gain the benefit of adjudication by different courts in different factual contexts. For this reason, a federal court when asked to certify a nationwide class should take care to ensure that nationwide relief is indeed appropriate in the case before it, and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts. But we decline to adopt the extreme position that such a class may never be certified.

Id. at 702-03, 99 S.Ct. at 2558. In this case, the same rules for recouping benefits as a result of excess earnings should apply regardless of where the dual beneficiary lives. Therefore, a class action presents an ideal method of assuring consistent treatment nationwide.

All requirements of Rule 23(a) and (b)(2), Federal Rules of Civil Procedure, having been satisfied, plaintiff Linquist's motion for class certification will be granted and the following class will be certified:

> All persons who are receiving or will receive both Social Security retirement benefits and Railroad retirement benefits, and who have been or will be denied the right to retain fifty percent of their excess earnings pursuant to the joint actions of the Social

Security Administration and the Railroad Retirement Board.

When a class is certified pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure, notice to the class members is not required. *Gibson v. Local 40, Supercargoes & Checkers,* 543 F.2d 1259, 1263 n.2 (9th Cir. 1976); *Johnson v. Georgia Highway Express, Inc.,* 417 F.2d 1122, 1125 (5th Cir. 1969), *appealed on other grounds after remand,* 488 F.2d 714 (5th Cir. 1974); A. R. Miller, "Problems of Giving Notice in Class Actions," 58 F.R.D. 313, 315 (1973). Therefore, without notice being sent to all class members, the Court will proceed to the merits.

IV. MERITS[8]

The Railroad Retirement Act of 1974[9] (RRA), provides for the payment of annuities to railroad employees and to certain dependents and survivors who have satisfied work-related requirements. 45 U.S.C. § 231a. The Social Security Act (SSA) provides similar benefits to eligible employees, spouses, children and other survivors. 42 U.S.C. §§ 401-433.

Both the RRA and the SSA provide for the reduction of benefits if a recipient has earnings that exceed a certain level in a year. The SSA provides that "[d]educ-

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[8] To a large extent this section is based on the meticulously researched and persuasively written dissenting opinion of Circuit Judge, now Senior Circuit Judge, George E. MacKinnon in *Burns (merits),* 701 F.2d at 197 (MacKinnon, J., dissenting).

[9] The Railroad Retirement Act of 1974 became effective on January 1, 1975. Pub.L. 93-445, 1974 U.S. Code Cong. & Ad. News 5702 (codified at 45 U.S.C. § 231).

tions . . . shall be made from any payment or payments under this subchapter to which an individual is entitled, and from any payment or payments to which any other persons are entitled on the basis of such individual's wages . . . if for such month he is charged with excess earnings, under the provisions of subsection (f) of this section. . . ." 42 U.S.C. § 403(b). Title 42 U.S.C § 403(f)(3), states that "an individual's excess earnings for a taxable year shall be 50 per centum of his earnings for such year in excess of [the exempt amount]." The excess earnings deduction is limited to the amount of benefits payable under the SSA. 42 U.S.C. § 403(b). Thus, in 1977, Social Security recipients' benefits were reduced by fifty percent of their earnings over $3,000[10] resulting in a $1 deduction in benefits for each $2 of excess earnings.

Since 1954, the RRA has incorporated by reference the excess earnings deduction provisions in the SSA. "Deductions . . . shall be made from any payments to which a survivor is entitled under subsection (d) of this section until the total of such deductions equals such survivor's annuity under that subsection for any month, if for such month such survivor would be charged with excess earnings under section 203(f) of the Social Security Act. . . ." 45 U.S.C. § 231a(g)(2). Therefore, under the RRA, there is a $1 deduction from benefits for each $2 of excess earnings.

Neither the SSA nor the RRA specifies how deductions for excess earnings are to be made if benefits are received by the same individual under both programs.

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[10] The amount of exempt earnings in 1974 was $2,400.

Therefore, the Board and the Secretary each deduct from benefits fifty percent of the dual recipient's excess earnings. Consequently, a person receiving benefits under both Acts has fifty percent of her excess earnings deducted from Social Security benefits and fifty percent of her excess earnings deducted from Railroad Retirement benefits. As a result, the dual recipient has one hundred percent of excess earnings deducted from benefits up to the total amount of benefits received in any month.

Plaintiffs assert that a one hundred percent deduction of excess earnings violates the intent of Congress in reducing the excess earnings deduction from one hundred to fifty percent in 1972. Defendants respond that both the SSA and RRA clearly require a deduction of fifty percent of excess earnings and, therefore, there is no need to consult legislative intent.

The function of this Court in interpreting statutes "is to construe the language so as to give effect to the intent of Congress." *United States v. America Trucking Ass'ns,* 310 U.S. 534, 542, 60 S.Ct. 1059, 1063 (1940). Although there is no invariable rule for the discovery of Congress' intention,

> To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation.
>
> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such

> cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination."

Id. at 542-44, 60 S.Ct. at 1063-64.

Courts should be wary of adopting a literal interpretation of a statute without considering extrinsic aids to the construction such as legislative history. "[O]nce the tyranny of literalness is rejected, all relevant considerations for giving a rational content to the words become operative." *United States v. Witkovich,* 353 U.S. 194, 199, 77 S.Ct. 779, 782 (1957). Frequently, the literal interpretation of a statute appears reasonable in isolation but is revealed as unreasonable when examined in light of legislative history. E.g., *Perry v. Commerce Loan Co.,* 383 U.S. 392, 86 S.Ct. 852 (1966); *Church of the Holy Trinity v. United States,* 143 U.S. 457, 12 S.Ct. 511 (1892); *General Serv. Employee Union Local 73 v. NLRB,* 578 F.2d 361, 366 (D.C. Cir. 1978); *Hodgson v. Board of County Commissioners, County of Hennepin,* 614 F.2d 601, 612 (8th Cir. 1980) (where the Court concluded that application of a statute's literal meaning would be "out of harmony" with the basic policy of the statutory scheme.)

Here, Congress has not stated in either the SSA or the RRA how the excess earnings deduction should be

applied to individuals receiving benefits under both Acts. For reasons that will be discussed later, there is sufficient doubt that Congress intended a $1 deduction from benefits for every $1 of excess earnings that resort to legislative history to determine the intent of Congress is warranted. *See Cass v. United States,* 417 U.S. 72, 77, 94 S.Ct. 2167, 2170 (1974).

Prior to 1972, both the SSA and the RRA required that for every $1 of excess earnings $1 in benefits would be deducted. In 1972, Congress amended the excess earnings provision in the SSA by changing the $1 deduction from benefits for each $1 of excess earnings to a $1 deduction from benefits for every $2 of excess earnings. Pub. L. 92-603, §§ 105(a)(3), 106(a), 1972 U.S. Code Cong. & Ad. News 4989 (codified at 42 U.S.C. § 403(f)(3)).

"The evidence is indeed 'overwhelming' that Congress reduced the offset to encourage social security beneficiaries to work." *Burns (merits)*, 701 F.2d at 196. For instance, in his Message to Congress Transmitting Proposals for Welfare Reform and Social Security Amendments, President Nixon stated:

> A feature of the present social security law that has drawn much criticism is the so-called "retirement test," a provision which limits the amount that a beneficiary can earn and still receive full benefits. . . . *The present retirement test actually penalizes social security beneficiaries for doing additional work or taking a job at higher pay. This is wrong.*
>
> In my view, many older people should be encouraged to work. Not only are they provided with added income, but the country retains the benefit of their skill and wisdom; they, in turn, have the feeling of

> usefulness and participation which employment can provide.

Burns (*merits*), 701 F.2d at 209 n.16 (MacKinnon, J., dissenting) (quoting the President's Message to Congress Transmitting Proposals for Welfare Reform and Social Security Amendments (September 25, 1969)).

The Undersecretary of Health, Education and Welfare testified before Congress in part as follows:

> [T]he really basic structural reform that we are proposing is that the dollar-for-dollar adjustment be dropped and that there be *no point where more than a dollar in benefits is taken away for each $2 that an individual earns, so that the present situation, where an individual . . . will find that he is actually losing by earning more, will no longer exist.* Under present law a person loses because he has expenses of working and he has to pay income taxes. . . . So he can lose by taking a job. . . .

Burns, 701 F.2d at 210 n.18 (MacKinnon, J., dissenting) (quoting the Social Security and Welfare Proposals: Hearings before the House Committee on Ways and Means, 91st Cong., 1st Sess. 155 (1969)).

The House Report accompanying the 1972 amendments stated in part:

> [Y]our committee believes that the American people do not want a system which results in promoting welfare as a way of life. Your committee's deliberations, therefore, have been aimed toward providing adequate assistance to those who cannot help themselves, while at the same time *creating a system of assistance which will maximize the incentive and the obligation of those who are able to work to help themselves.*

H.R. Rep. No. 231, 92nd Cong., 1st Sess. 2 (1971), 1972 Code Cong. & Ad. News 4990. Reducing the deduction for excess earnings would encourage social security beneficiaries to work because they would have more spendable income. "This change would assure that the more a beneficiary works and earns, the more spendable income (that is, social security benefits plus earnings after taxes) he will have." H.R. Rep. 231, 92nd Cong., 1st Sess. 2 (1971), 1972 U.S. Code Cong. & Ad. News 5036.

The Senate also intended by amending the excess earnings deduction to encourage beneficiaries to work. "The committee agrees with the President that *work should be rewarded and its value to the worker increased.* . . . A number of . . . provisions [including the excess earnings provision] are included in the committee bill which reflects the committee's aim of *increasing the benefits of working.*" S.Rep. No. 1230, 92nd Cong., 2d Sess. 28 (1972). The Senate report concluded that "there would be no $1-for-$1 reduction [in benefits] as under present law." *Id.*

Congress also thought that by increasing the incentive to work, more retired persons would generate excess earnings thereby reducing the drain on the finite public funds available to administer Social Security. *See* H.R. Rep. No. 231, 92nd Cong., 1st Sess. (1971); S.Rep. No. 1230, 92nd Cong., 2d Sess. (1972); *Burns (merits)*, 701 F.2d at 210 (MacKinnon, J., dissenting).

Because Congress so explicitly intended to reduce the excess earnings deduction in order to provide an incentive for beneficiaries to work, the defendants' literal application of the excess earnings provisions in the SSA and

RRA to dual beneficiaries must be rejected. The defendants' approach results in a $1 deduction from benefits for every $1 of excess earnings, which is the very formula Congress rejected in 1972. No legislative history or statutory provision suggests that Congress intended to encourage single beneficiaries to work but did not intend to encourage double beneficiaries to work.[11]

In *Freeman v. Harris*, 625 F.2d 1303 (5th Cir. 1980), the issue was whether the Secretary of Health, Education and Welfare's practice of offsetting both social security disability payments and black lung benefits against state workers' compensation payments was contrary to the intent of Congress. Both federal programs authorized the Secretary to reduce benefits if a recipient received state workers' compensation benefits. The Secretary applied both acts literally and reduced a recipient's workers' compensation benefits under both federal acts. Therefore, plaintiff received less benefits under the three programs than he would have had he not applied for workers' compensation at all.

The primary purpose of both federal programs was income replacement for the disabled worker. However, the offset provision in both federal acts were also designed to avoid overreplacement of a disabled worker's prior income and to ensure that a state's workers' compensation program was the primary provider.

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[11] The most reasonable conclusion is that Congress never contemplated the effect of the excess earnings deduction on dual beneficiaries. Courts frequently must apply statutes to situations that were not contemplated by the legislative branch. *Cass v. United States*, 417 U.S. 72, 83, 94 S.Ct. 2167, 2173; *Church of the Holy Trinity v. United States*, 143 U.S. 457, 472, 12 S.Ct. 511 (1892); *Freeman v. Harris*, 625 F.2d 1303, 1307 (5th Cir. 1980).

> We agree that the programs have twin goals and that, as far as possible, the law should be interpreted to carry out these goals. In this instance, however, both goals cannot be achieved. In essence, then, we are seeking to determine the intent of Congress as applied to a factual situation which obviously it did not forsee.

Id. at 1307.

The Court then concluded that the Secretary's double offset policy "contravenes congressional intent."

> It is undeniable that the effect of the double offset is to discourage a miner from pursuing workers' compensation, and thus to encourage the miners to rely exclusively on the federal government for compensation. This result is clearly at odds with a prime Congressional intent of making state workers' compensation the program to which citizens should turn first for disability compensation.

Id. at 1308.

In order to allow the two federal programs "to operate in concert consistently with Congressional intent . . ." the Court ordered the Secretary to offset the benefits from the federal programs against workers compensation benefits so that the total offset did not exceed one hundred percent of the workers compensation benefits. *Id.* at 1309.

In the instant case, the argument for rejecting the Board and the Secretary's policy of offsetting one hundred percent of excess earnings against benefits is stronger than in *Freeman*. There, the Secretary's policy at least promoted one congressional goal, i.e., overreplacement of workers' prior income. Here, the defendants have not identified any Congressional purpose underlying the 1972

amendment to the excess earnings deduction that is advanced by the literal application of the excess earnings deduction to dual beneficiaries.

Defendants rely on the majority decision in *Burns (merits)*, 701 F.2d at 197 where the Court reached the opposite result from this case.

> It is treacherous to brush aside the literal meaning of those provisions and, by riveting attention on work incentive, avoid forthright recognition of another concern on the mind of Congress. That concern relates to the appropriateness of allowing a retiree to collect two federal social insurance benefits.

Because of Congress' "ambivalence . . . regarding allowance of dual benefits and the legislature's ultimate rejection of them . . .", the *Burns* court did not want to guess how Congress would have reacted had it explicitly faced the application of excess earnings offsets to dual beneficiaries. *Id.* at 197. "Congress might well have considered a double offset a fitting match for a double benefit." *Id.* at 198. "In sum, while the wisdom of a dual or dollar-for-dollar offset is indeed debatable, 'we think it clear that Congress could rationally choose to adopt such a course.' " *Id.* (quoting from *Weinberger v. Salfi*, 422 U.S. at 81, 95 S.Ct. at 2472).

Even if dual beneficiaries received a one hundred percent increase in benefits over a single beneficiary (which they do not),[12] it is difficult to see the rationality of the

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[12] In 1977, plaintiff received approximately $4,204 in benefits from both the SSA and RRA. According to defendant Board's answers to plaintiff's Supplemental Interrogatories, this is less

(Continued on following page)

Burns analysis. To conclude that Congress would have wanted to discourage double beneficiaries from working produces precisely the result Congress so explicitly disavowed, i.e., a dollar-for-dollar offset. For the dual beneficiary, the dollar-for-dollar offset has the same effect as on a single beneficiary; the incentive to work is reduced.[13] Without an incentive to work and thereby generate excess income, the dual beneficiary would be even less likely than the single beneficiary to generate the excess earnings that would reduce the burden on the finite funds available to pay benefits. Congress' unequivocal intent to encourage Social Security recipients to work must be effectuated

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(Continued from previous page)

than she would have received if her earnings and her husband's had been covered under the Railroad Retirement Act. Furthermore, the total benefits plaintiff received in 1977 under both acts is only slightly more than she would have received if her earnings and her husband's had been covered under the SSA. See letter from Department of Justice attorney Seaman attached as Exhibit B to plaintiff's Motion for Summary Judgment, filed July 24, 1981.

Furthermore, according to the Board's brief in *Burns*, only forty-two percent of widow annuitants receiving dual benefits receive a dual benefit component. Without this component, a dual beneficiary receives no extra income because one benefit is offset by the other. Therefore, fifty-eight percent of the widow annuitants receiving dual benefits do not receive more benefits under both programs than they would under one.

In addition, the Board's response to Interrogatory No. 16 filed on February 20, 1981, states that a survivor collecting benefits under both programs would receive a maximum of thirty percent more than he or she would under only one program. Therefore, dual beneficiaries do not receive a one hundred percent increase in benefits over single beneficiaries. How a double offset for excess earnings rationally responds to these facts is unexplained in *Burns (merits)*.

[13] See Linquist's testimony that she would have worked less if she had known that she would have all of her excess earnings set off against benefits. Administrative record at 82.

rather than some hypothetical Congressional purpose that produces a result at odds with Congress' unequivocal intent. *See Freeman*, 625 F.2d at 1308.

Therefore, in order to effectuate Congress' desire to encourage recipients to work, the Board and the Secretary will be required to coordinate the reduction of benefits for excess earnings so that recipients lose no more than $1 of benefits for each $2 of excess earnings. Then, and only then, will dual beneficiaries have the incentive to work Congress intended in 1972.

Having concluded that the defendants' joint application of the excess earnings deduction to persons receiving benefits under both the Social Security Act and the Railroad Retirement Act violates the intent of Congress, it is unnecessary to determine whether plaintiffs Linquist's constitutional rights also are violated. Plaintiff Burns' allegations that defendants' actions violate her due process rights and the principles of equitable estoppel are not addressed because plaintiff Burns falls within the class definition and, therefore, is entitled to the class relief.

ORDER

Therefore, it is ORDERED that:

1) intervening plaintiff Burns' claims against defendant the United States Railroad Retirement Board are hereby dismissed;

2) intervening plaintiff Burns' claims that defendant Board's policy of recouping fifty percent of a recipient's excess earnings after fifty percent has already been recouped by the Secretary is contrary to Congressional intent and violates her right to equal protection of the laws

under the Fifth Amendment to the United States Constitution are hereby dismissed;

3) plaintiff Linquist's motion for class certification is granted and the following class is hereby certified:

> All persons who are receiving or who will receive both Social Security retirement benefits and Railroad retirement benefits, and who have been or will be denied the right to retain fifty percent of their excess earnings pursuant to the joint actions of the Social Security Administration and the Railroad Retirement Board;

4) defendants' policy of deducting more than fifty percent of a dual beneficiary's excess earnings from total benefits under the SSA and the RRA violates the intent of Congress in limiting the excess earnings deduction to fifty percent;

5) the Board and the Secretary shall coordinate their application of the excess earnings deduction so that every class member may retain fifty percent of his or her excess earnings;

6) within sixty days from the date of this Order, the defendants shall advise the Court and plaintiff Linquist how the Board and the Secretary propose to coordinate the reduction of benefits so that no class member loses more than $1 of benefits for each $2 of excess earnings; and

7) within sixty days from the date of this Order, the parties shall discuss between themselves the procedure for granting retroactive monetary relief to members of the class and shall report to the Court on what further pro-

ceedings are believed necessary in order to determine appropriate relief for the class.

/s/ D. Brook Bartlett
D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri
January 31, 1986.

APPENDIX C

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

Nos. 86-1486/1790 WM

Lois Linquist, et al.,	)	
	)	Appeal from the
Appellees/Cr-Appellants,	)	United States
	)	District Court
vs.	)	for the Western
	)	District of
Otis R. Bowen, etc., et al.,	)	Missouri
	)	
	)	
Appellants/Cr-Appellees.	)	

The Secretary's motion for a stay pending appeal is granted.

Appellees' brief shall be filed July 30, 1986. Appellants' Reply Brief shall be due August 14, 1986.

The Clerk is directed to place this case on the Court's calendar for September, 1986, in St. Louis, Missouri.

July 18, 1986

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 86-1486/1790/2075

Lois Linquist and Alberta E. Burns,	)	
Appellees,	)	
v.	)	Appeals from the United States District Court for the Western District of Missouri.
Otis R. Bowen, Secretary of the Department of Health and Human Services, and United States Railroad Retirement Board,	)	
Appellants.	)	

Submitted: September 8, 1986

Filed: March 9, 1987

Before LAY, Chief Judge, HEANEY and BOWMAN, Circuit Judges.

LAY, Chief Judge.

Lois Linquist, now 78 years old, receives retirement benefits under the Social Security Act (SSA) and the Railroad Retirement Act (RRA).[1] Each Act provides for

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[1]Linquist's benefits under the SSA are based on her own work record. From the RRA she receives survivor benefits, derived from the work record of her deceased husband.

a fifty percent reduction in benefits if a recipient's outside earnings exceed a certain level in a year. *See* 42 U.S.C. § 403(b) (1982)[2] and *id.* § 403(f)(3)[3] (the SSA provisions); 45 U.S.C. § 231a(g)(2) (1982)[4] (the RRA provision). Linquist earned $3415 in 1977, when the amount of earnings exempt under the Acts was $3000.[5] Pursuant to the RRA recoupment provision, the Railroad Retirement Board (the Board) notified Linquist that she had been overpaid by $207, fifty percent of her excess earnings. She repaid that amount to the Board. Seven months later, the SSA similarly informed Linquist that she owed it $207 because of the same $415 of 1977 excess earnings. The agency stated that it would withhold that amount from her future benefits. Linquist unsuccessfully challenged that action through the SSA's administrative process. She then filed her

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[2]Section 403(b) provides: "Deductions * * * shall be made from any payment or payments under this subchapter to which an individual is entitled * * * if for such month he is charged with excess earnings, under the provisions of subsection (f) of this section * * *."

[3]Section 403(f)(3) provides: "[A]n individual's excess earnings for a taxable year shall be 50 per centum of his earnings for such year in excess of * * * the applicable exempt amount * * *."

[4]Section 231a(g)(2) provides: "Deductions * * * shall be made from any payments to which a survivor is entitled * * * if for such month such survivor would be charged with excess earnings under [42 U.S.C. § 403(f)] * * *."

[5]The exempt amount has increased over time, and currently is approximately $6000. *See* 42 U.S.C. § 403(f)(8)(D) (1982) (instructing Secretary to publish new exempt amount to match cost-of-living benefits increases).

complaint in district court, naming the Board and the Secretary as defendants.[6]

The district court,[7] on January 31, 1986, ordered relief for a nationwide class both prospectively and retroactive to 1972.[8] *See Linquist v. Bowen*, 633 F. Supp. 846, 866-67 (W.D. Mo. 1986). On May 22, 1986, the court denied the defendants' request for a stay and ordered full implementation of the remedial program. This court granted the government's motion for a stay on July 17, 1986, pending the present appeal. On appeal, the government challenges the class certification, the district court's jurisdiction over the Board, and the merits of the decision reached. For the reasons set forth below, we affirm the district court's decision in all respects.

I. Jurisdiction

The district court based its jurisdiction on the mandamus power under the All Writs Act, 28 U.S.C. § 1361 (1982). *See* 633 F. Supp. at 853-57. The court also noted that 28 U.S.C. § 1337 (1982), which provides jurisdiction

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[6]Plaintiff Loretta Burns intervened in this action. The agencies acted in reverse order in her case, but with the same result. The Board and the Secretary each sought to recoup $700, fifty percent of Burns' excess earnings in 1975. The court below dismissed Burns' claims on res judicata grounds, due to the adverse decision in *Burns v. United States R.R. Retirement Bd.*, 701 F.2d 193 (D.C. Cir. 1983). Burns has not appealed the dismissal of her claims, and we do not address the portion of the district court's opinion relating specifically to her.

[7]The Honorable D. Brook Bartlett, United States District Judge for the Western District of Missouri, presiding.

[8]The year 1972 is significant because until that year both the SSA and the RRA allowed 100% offset of excess earnings. *See* Pub. L. 92-603, § 105(a)(3), 86 Stat. 1329 (1972).

for civil cases under laws regulating commerce, was an alternative basis for its jurisdiction. See 633 F. Supp. at 857 n.5. The defendants raise two distinct challenges to the district court's exercise of jurisdiction. First, the defendants claim that the class members' complaints were never properly "presented" to the Secretary, thus 42 U.S.C. §§ 405(g) and (h) precluded judicial review of all but Linquist's claim. The defendants argue that resort to the mandamus statute to avoid the exclusive provisions of § 405(h) was improper. Second, the defendants challenge the district court's exercise of jurisdiction over the Board citing 45 U.S.C. §§ 355(f) and (g) (as incorporated by *id.* § 231g), which provide for exclusive review of Railroad Retirement Board decisions in the courts of appeals.

A. Class Certification

The district court certified a nationwide class, which includes the following:

> All persons who are receiving or who will receive both Social Security retirement benefits and Railroad Retirement benefits and who have been or will be denied the right to retain fifty percent of their excess earnings pursuant to the joint actions of the Social Security Administration and the Railroad Retirement Board.

633 F. Supp. at 861-62, 867. The agencies challenge this certification, as they assert that only plaintiff Linquist's claim is properly advanced for judicial consideration.

Under the SSA, the first prerequisite to judicial review is that the claimant "present" a claim to the Secre-

tary;[9] the second requires the claimant to exhaust fully the administrative process. *Bowen v. City of New York*, 106 S. Ct. 2022, 2031 (1986); *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976). According to the defendants, Linquist was the only person to meet the nonwaivable presentment requirement.[10] The plaintiffs counter that presentment did take place, when the class members provided their earnings records to the agencies.

As the defendants acknowledge, nearly all of the cases in this area deal with exhaustion, rather than the presentment. However, as the Ninth Circuit noted in *Lopez v. Heckler*, 726 F.2d 1489, 1503 (9th Cir.), *vacated on other grounds*, 469 U.S. 1082 (1984), the courts that have dealt with presentment have interpreted the requirement "liberally." Presentment is procedurally necessary to establish *entitlement* to benefits, and presentment of a claim is the natural first step that any individual seeking benefits would take. The members of the class certified below have taken this step, and they have received benefits. Subsequently, they have provided the Secretary records of

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[9]In 42 U.S.C. § 405(g) the SSA provides in part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party * * * may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow.

[10]The exhaustion requirement, by contrast, is waivable. *See Mathews*, 424 U.S. at 328. Courts often have not required exhaustion in cases like the present one, with or without formal waiver by the Secretary. *See Bowen*, 106 S. Ct. at 2031; *Mathews*, 424 U.S. at 330-32; *Mental Health Ass'n v. Heckler*, 720 F.2d 965, 969-70 (8th Cir. 1983). Given the lack of success in Linquist's administrative appeals, we conclude that waiver of exhaustion is proper here for the entire class.

their outside earnings. They thus have performed the affirmative acts required by law. Proper presentment in this nonentitlement case[11] does not necessitate a further claim, one challenging the recoupment of benefits. The Secretary is quite aware of a recipient's uninterrupted claim for the full benefits allowed by law, whether or not the particular recipient has actively challenged the double offset. We thus find the class members' claims against the Secretary are properly before the court under § 405(g) of the SSA.[12]

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[11]This case involves recoupment caused by excess earnings, not entitlement to benefits. The cases cited by the government are in the context of entitlement, either original or after a termination. *See Heckler v. Lopez*, 463 U.S. 1328, 1328-29 (1983); *City of New York v. Heckler*, 742 F.2d 729, 735 (2d Cir. 1984), *aff'd sub nom. Bowen*, 106 S. Ct. at 2022. Those cases are inapposite in the present context.

As we stated in the text, the plaintiffs have presented their claims for benefits, and the agencies have found them entitled to benefits. This status has never been terminated. Instead, the present dispute is outside the traditional scope of 42 U.S.C. § 405(h), which requires entitlement decisions to be finalized inside the agency before any suit in federal court. Once the entitlement decision has been made and settled, the original presentment and subsequent earnings reports suffice to invoke the district court's jurisdiction.

[12]Even if the claims were not properly presented, we think the district court's exercise of mandamus jurisdiction would have been permissible. *See Ellis v. Blum*, 643 F.2d 68, 77 n.10 (2d Cir. 1981) (indicating no presentment needed under mandamus provisions). The courts have long wrestled with the question of whether 42 U.S.C. §§ 405(g) and (h) preclude district court mandamus jurisdiction over the Secretary in Social Security cases. The Supreme Court has reserved the question several times. *See Bowen*, 106 S. Ct. at 2028 n.9; *Heckler v. Ringer*, 466 U.S. 602, 616 (1984); *Califano v. Yamasaki*, 442 U.S. 682, 698 (1979); *Norton v. Mathews*, 427 U.S. 524, 529-30 (1976); *Mathews v. Eldridge*, 424 U.S. 319, 332 n.12 (1976). Several courts of appeals, including

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B. Jurisdiction Over the Railroad Retirement Board

The district court recognized that the RRA vests exclusive jurisdiction in the courts of appeals over appeals from Board decisions. Notwithstanding the provisions of 45 U.S.C. §§ 355(f) and (g) (incorporated by *id.* § 231g), the district court exercised jurisdiction over the Board under 28 U.S.C. § 1361. In challenging the district court's jurisdiction, the defendants essentially conclude that this case never could be heard in a single court, given the differing modes of judicial review. They primarily cite *Denberg v. United States R.R. Retirement Bd.*, 696 F.2d 1193, 1196-98 (7th Cir. 1983) (rejecting district court jurisdiction over Board), *cert. denied*, 466 U.S. 926 (1984). We agree, however, with the District of Columbia Circuit's statement in *Burns v. United States R.R. Retirement Bd.*, 701 F.2d 189 (D.C. Cir. 1983), which the district court quoted, that "'Congress did not intend to create a pro-

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this one, have held that § 405(g) does *not* preclude the exercise of mandamus jurisdiction. *See Lopez v. Heckler*, 725 F.2d 1489, 1507-08 (9th Cir.), *vacated on other grounds*, 469 U.S. 1082 (1984); *Mental Health Ass'n v. Heckler*, 720 F.2d 965, 971 n.17 (8th Cir. 1983); *Belles v. Schweiker*, 720 F.2d 509, 412-13 (8th Cir. 1983); *Ellis*, 643 F.2d at 78-82; *Martinez v. Richardson*, 472 F.2d 1121, 1125 (10th Cir. 1973).

Mandamus is an extraordinary means of federal court power, reserved for special situations of necessity. *Ringer*, 466 U.S. at 616. This is such a situation. First, mandamus is appropriate in a Social Security case when the dispute does not involve entitlement to benefits per se. *Belles*, 720 F.2d at 512-13; *Mental Health Ass'n*, 720 F.2d at 971 n.17. This case involves a collateral issue—the propriety of double recoupment. This is not an issue that Congress delegated to the agencies. *Cf. Mental Health Ass'n*, 720 F.2d at 971 n.17 (distinguishing procedural decision from eligibility determinations delegated to agency). We find that the court's exercise of mandamus jurisdiction did not contradict sections 405(g) and (h).

cedural conundrum of this kind.'" *See* 633 F. Supp. at 856 (quoting *Burns*, 701 F.2d at 192 n.11). We think the district court properly resolved the dilemma by resorting to the mandamus statute.

The presence of both defendant agencies in one case is essential to proper determination of this important issue. The district court's exercise of mandamus jurisdiction allowed the Board to be joined, thus facilitating combined review of the agencies' interpretations of their respective recoupment statutes. We find the present circumstances more than sufficient to reach the high level of necessity that mandamus jurisdiction requires.[13]

We conclude that the district court had proper jurisdiction to hear all aspects of this case.[14]

II. Statutory Construction

Our objective in interpreting a federal statute is to achieve the intent of Congress. *See United States v. American Trucking Ass'ns*, 310 U.S. 534, 532 (1940); *Groseclose v. Bowen*, No. 86-1479, slip op. at 5-7 (8th Cir. Jan. 15, 1987); *Stribling v. United States*, 419 F.2d 1350, 1352 (8th Cir. 1969); *Lambur v. Yates*, 148 F.2d 137, 139 (8th

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[13]This is not the first case in which a district court has exercised jurisdiction over the Board. *See United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980); *Yost v. Schweiker*, 699 F.2d 438 (8th Cir. 1983); *Finnerty v. Cowen*, 508 F.2d 979, 984 (2d Cir. 1974). *But see Denberg v. United States R.R. Retirement Bd.*, 696 F.2d 1193 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1706 (1984).

[14]We leave for another day the decision on the applicability of 28 U.S.C. § 1337 (1982) in cases of this type. We do note that some support for applying § 1337 is provided in *Finnerty v. Cowen*, 508 F.2d 979, 983-84 (2d Cir. 1974).

Cir. 1945). A primary rule of statutory construction is that when a court interprets multiple statutes dealing with a related subject or object, the statutes are *in pari materia* and must be considered together. *United States v. Freeman,* 44 U.S. (3 How.) 556, 564-65 (1845); N. Singer, 2A *Sutherland Construction* § 51.01-.03 (C. Sands 4th ed. 1984). The proper comprehensive analysis thus reads the parts of a statutory scheme together, bearing in mind the congressional intent underlying the whole scheme. *See, e.g., Chapman v. Houston Welfare Rights Org.,* 441 U.S. 600, 607-12 (1979); *United States v. Freeman,* 44 U.S. (3 How.) at 564-65; *Kifer v. Liberty Mut. Ins. Co.,* 777 F.2d 1325, 1332 (8th Cir. 1985).

There can be no question that the challenged provisions of the Social Security Act, 42 U.S.C. §§ 403(b) and 403(f)(3), and the Railroad Retirement Act provision, 45 U.S.C. § 231a(g)(2), are *in pari materia.* In fact, their language is identical due to the RRA incorporation of the SSA. In this situation, we must consider the legislative history of either Act as applying to both. And, more importantly, we must consider the congressional intent behind the entire worker retirement benefits scheme in determining how these Acts should be applied in tandem.

When Congress amended the SSA—and thus the RRA—in 1972, the clearly articulated purpose was to encourage retired persons to work. This underlying intent is not disputed by the parties in this case, and it has been recognized by the court below *see* 633 F. Supp. at 863-66, by the majority in *Burns, see* 701 F.2d at 196, and by Judge MacKinnon's dissent in *Burns, see id.* at 209-10.

Everyone agrees that the former deduction of one dollar for every dollar in excess earnings discouraged

recipients from working. Under the 1972 amendments, a person loses only one dollar for every two dollars of excess earnings. The House Report accompanying this change was strongly worded:

> [Y]our committee believes that the American people do not want a system which results in promoting welfare as a way of life. Your committee's deliberations, therefore, have been aimed toward providing adequate assistance to those who cannot help themselves, while at the same time creating a system of assistance which will maximize the incentive and the obligation of those who are able to work to help themselves.

H.R. Rep. No. 231, 92d Cong., 1st Sess. 2, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4989, 4990. The Senate Report was equally definite: "The committee agrees with the President that work should be rewarded and its value to the worker increased. * * *. A number of * * * provisions [including the excess earnings provision] are included in the committee bill which reflects the committee's aim of increasing the benefits of working."[15] S. Rep. No. 1230, 92d Cong., 2d Sess. 28 (1972).

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[15]The allusion to the President stemmed from President Nixon's support of the amendments:

> A feature of the present social security law that has drawn much criticism is the so-called "retirement test," a provision which limits the amount that a beneficiary can earn and still receive full benefits. * * * The present retirement test actually penalizes social security beneficiaries for doing additional work or taking a job at higher pay. This is wrong.
>
> In my view, many older people should be encouraged to work. Not only are they provided with added income, but the country retains the benefit of their skill and wisdom;

(Continued on following page)

As the district court and the *Burns* opinions have noted, no congressional intent was expressed either way regarding the 100% offset for dual beneficiaries. *See Burns*, 701 F.2d at 196, 198; *id.* at 210-12 (MacKinnon, J. dissenting); *Linquist*, 633 F. Supp. at 863. Congress apparently did not consider the question. *Cf. Freeman v. Harris*, 625 F.2d 1303, 1307 (5th Cir. 1980) ("In essence, then, we are seeking to determine the intent of Congress as applied to a factual situation which obviously it did not foresee."). To draw a negative inference of congressional intent from vague or missing legislative history would be hazardous at best. Nor should we speculate, as the government suggests that we should, that Congress *intended* to deny the amendment's benefit to dual recipients like Linquist. *Cf. St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 550 (1978) ("If Congress had intended to limit its scope * * * it is not unreasonable to assume that it would have made this explicit."). Furthermore, congressional inaction in the face of ongoing 100% offsets is not sufficient to demonstrate approval of the practice. *Cf. Morton v. Ruiz*, 415 U.S. 199, 230 (1974) (rejecting implicit congressional ratification of agency policy when no proof that Congress knew of the policy); *N. Singer, supra*, § 49.10, at 408.

(Continued from previous page)

they, in turn, have the feeling of usefulness and participation which employment can provide.

President's Message to Congress Transmitting Proposals for Welfare Reform and Social Security Amendments (Sept. 25, 1969), in House Comm. on Ways and Means, 91st Cong., 1st Sess., the President's Proposals for Welfare Reform and Social Security Amendments 1969, at 12 (Comm. Print 1969).

Freeman v. Harris, 625 F.2d 1303 (5th Cir. 1980), provides strong support for the district court's decision in our case. *Freeman* presented a closely analogous situation involving benefit offsets by the Secretary of Health, Education and Welfare. The Secretary's practice was to offset both social security disability payments and black lung benefits against state workers' compensation benefits.[16] Because both federal programs in *Freeman* allowed reduced benefits to workers' compensation recipients, the plaintiff received less under the three programs than he would have without the state program. The Fifth Circuit overturned the Secretary's literal application of the Acts involved. The court found it unacceptable to use Acts designed to *help* disabled miners to actually *harm* them. *See id.* at 1307-08. Even though Congress had not foreseen the exact situation that developed, the court honored the beneficient intent underlying the Acts.

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[16]We recognize the canon of construction giving some deference to an agency's interpretation of a statutory plan that it is required to implement. *See Young v. Community Nutrition Inst.*, 106 S. Ct. 2360, 2364-65 (1986); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984); *Department of Social Services v. Bowen*, 804 F.2d 1035, 1037-38 (8th Cir. 1986). Like the Fifth Circuit in *Freeman*, however, we refuse to give absolute deference to the agencies. This court often has interpreted statutes in a way contrary to the administrative viewpoint. *See, e.g., Groseclose v. Bowen*, No. 86-1479, slip op. at 5-7 (8th Cir. Jan. 15, 1987); *Missouri v. Andres*, 787 F.2d 270, 286 (8th Cir. 1986); *Costello v. United States R.R. Retirement Bd.*, 780 F.2d 1352, 1354-55 (8th Cir. 1985). As the Supreme Court has said: "Although an agency's interpretation of the statute under which it operates is entitled to some deference, 'this deference is constrained by our obligation to honor the clear meaning of a statute as revealed by its language, purpose, and history.' " *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979) (quoting *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 566 n. 20 (1979)).

Like the Fifth Circuit in *Freeman*, we must construe *in pari materia* provisions in light of recognized legislative policy. Congress' desire to encourage outside employment must be weighed heavily in our attempt to sort out the entire SSA and RRA scheme. This policy conflicts with the position of the Secretary and the Board. Congress would not want to encourage some, but not other, beneficiaries to work. It is clear that Congress intended to encourage all beneficiaries to work, including dual-source recipients like Lois Linquist and the other class-members. The statutory scheme makes sense only if this overriding congressional intent is preserved. *Cf. Heckler v. Edwards*, 465 U.S. 870, 879-85 (1984) (following intent of Congress despite literal language of statute).

III. Conclusion

For the reasons set forth above, we conclude that the district court properly ordered the SSA and RRB to coordinate their application of the excess earnings deduction. The Secretary and the Board *together* may not recoup more than a total of one dollar for every two dollars earned above the statutory amount. We reinstate the district court's order to the agencies to produce a plan for this coordination and to devise procedures for retroactive relief.

The judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX E

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

Nos. 86-1486/1790/2075

Lois Linquist and Alberta E. Burns, Appellees, v. Otis R. Bowen, Secretary of the Department of Health and Human Services, and United States Railroad Retirement Board, Appellants.	)	Appeals from the United States District Court for the Western District of Missouri.

The Court finds that the claimant's counsel are entitled to attorney fees under the Equal Access Justice Act 28 U.S.C. 2412(b).[1] The Court finds that the claimant has successfully established a common benefit theory for a class of some 2,000 people. On this basis, the Court finds

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[1]28 U.S.C. § 2412(b) states:

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

that the claimant has recovered under a common law theory of common benefits which has conferred a substantial benefit on the members of an ascertainable class.

Based upon the hours and rates listed, the court finds that the claimant's attorneys are entitled to collect as follows:

Attorney Deford will receive compensation for 163.75 hours at $125 per hour for a total of $20,468.75 plus expenses in the sum $532.82.

Attorney Nixon is entitled to recover 25.25 hours at $75.00 for a total of $1,893.75.

Under the circumstances, it is not necessary for the court to pass on the question of whether the claimant is entitled to attorney fees under 28 U.S.C. § 2412(d).

IT IS SO ORDERED.

September 1, 1987

APPENDIX F

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

Nos. 86-1486/1790/2075-WM

Lois Linquist, et al.,	)	
Appellees,	)	Appeals from the
vs.	)	United States
	)	District Court for
Otis R. Bowen, etc., et al.,	)	the Western Dis-
	)	trict of Missouri
Appellants	)	

Appellants' petition for rehearing on the attorneys' fee order is granted. The Court will hear oral argument in the Courthouse in St. Paul, Minnesota, at 2:00 p.m. on Wednesday, December 16, 1987.

The parties are directed to file supplemental briefs, limited to fifteen (15) pages in length, in accordance with the schedule listed below. Counsel are to specifically address whether attorneys' fees may be awarded under 28 U.S.C. § 2412(b) and (d).

Brief appellants	November 20, 1987
Brief appellees	December 4, 1987
	November 9, 1987

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, United States Court of Appeals, Eighth Circuit

APPENDIX G

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

Nos. 86-1486, 86-1790
and 86-2075WM

Lois Linquist, et al,	)	
Appellees,	)	Appeals from the
vs.	)	United States Dis-
	)	trict Court for the
Otis R. Bowen, etc., et al,	)	Western District
	)	of Missouri.
Appellants.	)	

Appellees' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

March 24, 1988

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX H

28 U.S.C. § 2412(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

28 U.S.C. § 2412(c)(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

28 U.S.C. § 2412(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against

the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.